90-844

No. _____

In The

Supreme Court of the United States

October Term, 1990

HOWARD ELECTRICAL & MECHANICAL, INC., and HOWARD SYSTEMS, INC.,

Petitioners,

v.

TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

EARL K. MADSEN*
JIM MICHAEL HANSEN
BRADLEY, CAMPBELL, CARNEY & MADSEN
1717 Washington Avenue
Golden, Colorado 80401-1994
(303) 278-3300

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

National Labor Relations Board unfair labor practice charges were filed by two unions against the employer with whom the unions had engaged in collective bargaining negotiations, claiming that the employer had unlawfully terminated its obligation to contribute to the employees' pension fund. Subsequently, the pension fund filed an Employee Retirement Income Security Act ("ERISA") withdrawal liability suit based on the identical alleged conduct. The District Court in this case held that the NLRB had primary jurisdiction and that the Court therefore lacked jurisdiction, but the Court of Appeals reversed. The questions presented for review are:

1. Whether, in light of the doctrine of NLRB primary jurisdiction, ERISA requires that an employer against whom withdrawal liability has been assessed must initiate arbitration of the pension fund's claim that the employer withdrew from the Fund even though the identical claim is pending before the NLRB in unfair labor practice proceedings.

2. Whether ERISA requires that legal issues of the arbitrator's jurisdiction must be submitted to arbitration rather than to a court for judicial determination.

3. Whether, contrary to the Tenth Circuit decision, the doctrine of equitable tolling applies to arbitration under ERISA, as determined by other courts of appeal.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to the parties listed in the caption, the following fund trustees were parties to the proceeding before the United States Court of Appeals for the Tenth Circuit:

Bill Baker
Henry Beck
Dale Camblin
Paul E. Emrick
Max L. Flint
Jim Eatmon
Ed McCloskey
Joe Moring
Jerry Mullenback
Lee Overholt
Leon H. Land, Administrator
Darrell Raymond
Wesley Reichard
Larry Schaap
George Scholz
Mike Schreiber
Gary Schultz
Mike Trapp
Dennis Cole
Ray Pfeifer
Harold Taylor

Howard Systems, Inc. is the parent of Howard Electrical and Mechanical, Inc. There are no other parent or subsidiary companies.

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STATUTES:

National Labor Relations Act, as amended:

Employee Retirement Income and Security Act, as amended:

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit (App., *infra*, A1-A19) is reported at 909 F.2d 1379 (10th Cir. 1990). The opinion and order of the United States District Court for the District of Colorado (App., *infra*, A20-A25) was not published.

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1990. The Court of Appeals denied petitioners' timely petition for rehearing on August 27, 1990. The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Tenth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. §§ 158(a)(1) and (5), and the Employee Retirement Income Security Act as amended by the Multiemployer Pension Plan Amendment Act of 1980, 29 U.S.C. §§ 1381-1405, and 1451 are set forth at App., *infra*, A142-A160.

STATEMENT

A. Background Labor Relations History

Howard Electrical and Mechanical, Inc. ("Howard") is a mechanical contractor situated in Denver, Colorado.

This case has resulted from a labor dispute between Howard and two unions representing Howard's construction unit employees, Plumbers Local No. 3 and Pipefitters Local No. 208 (collectively "unions"). Howard and the unions have been parties to collective bargaining agreements since 1952. Indeed, following much of the protracted labor dispute and litigation here, Howard and its two unions entered into a successor labor agreement dated July 2, 1988.

The most recent labor contract to which Howard was signatory with the two unions, prior to the dispute in issue, was effective May 1, 1981, through May 31, 1983. Prior to expiration of this agreement, Howard and the unions commenced bargaining negotiations, which continued into 1984.

Howard eventually presented a proposal to the unions dated June 19, 1984. This proposal suggested a number of changes in the contract provisions and the relationships between the parties. It excluded certain employees, "apprentices," from the bargaining unit, made revisions to the hiring hall procedures of the unions and gave Howard the right to hire employees without going through the hiring hall of the unions.[1] The June 19, 1984, proposal continued Howard's obligation to provide pension benefit payments to the Fund.[2] Later, however, on August 15, 1984, Howard submitted a new proposal

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[1] NLRB Decision, App., *infra*, A31.

[2] The Colorado Pipe Industry Pension Fund ("Fund") is a multiemployer pension fund within the meaning of ERISA established to provide retirement benefits for employees in the plumbing and pipefitting industry in Colorado.

which changed the benefit portion of its previous June 19, 1984, bargaining proposal. By identical letters dated August 15, 1984, Howard notified the unions with respect to the "health, welfare, vacation and other funds" provision of the previous proposal, that Howard was now adding the following language to its proposal:

> Each employee covered by this agreement shall be given the option to participate in the above plans [referring to the contract employee benefit and pension plans] subject to the approval of the trustees of the various funds, or to participate in the company's profit-sharing plan and major medical plan subject to the rules for eligibility provided for in said plans.[3]

Howard's letters to the unions stated that "if you do not accept this change by August 20, 1984," Howard will "presume that you have rejected the change and [ ] will implement it immediately."

Local No. 3 and Local No. 208 immediately responded to Howard's August 15, 1984, proposal by identical letters dated August 16, 1984, and August 20, 1984, rejecting the proposal and contending that Howard's August 15 letter contained proposals never previously discussed or negotiated with them.[4]

B. The NLRB Charges and Proceedings

On August 22, 1984, and August 28, 1984, the unions filed identical charges with the National Labor Relations

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[3] NLRB Decision, App., *infra*, A29-A30, n.2. *See also* the Administrative Law Judge Decision, App., *infra*, A72.

[4] *Id.*

Board (hereinafter "NLRB" or "Board") maintaining that Howard violated the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5) and (1). The unions claimed that Howard unilaterally revised the provisions of the employee pension, medical insurance and vacation programs by implementing its August 15, 1984, bargaining proposal without first bargaining to impasse.[5]

The NLRB issued a complaint, hearings were conducted in January 1987, and the administrative law judge issued his decision on April 8, 1987. In his decision, the ALJ concluded that there was insufficient evidence in the proceeding before him to establish that Howard had in fact implemented its August 15, 1984, proposal, and therefore, he recommended that the complaint be dismissed "insofar as it encompasses this allegation."[6]

The NLRB agreed and adopted the decision of the ALJ on this issue:

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[5] Charges No. 27-CA-8924, and 27-CA-8889-2, respectively. On September 25, 1984, Local No. 208 in Case No. 27-CA-8924 filed an amended charge alleging that Howard since February of 1984 had continued to violate §§ 8(a)(5) and (1) of the Act by unilaterally changing wages, working conditions and terms of employment for employees. The parties subsequently, in October 1984, entered into a settlement agreement which was filed with the NLRB, whereunder the parties believed they had resolved these claims. Subsequently, however, a dispute arose as to the nature of the parties' obligations under this settlement agreement, and the understandings of the parties as to what had been settled. The NLRB Regional Director then set aside the settlement agreement and issued a complaint based on the previously filed unfair labor practice charges.

[6] Administrative Law Judge's Decision, App., *infra*, A117.

> The complaint alleges that [Howard] violated Sec. 8(a)(5) and (1) by unilaterally changing the unit employees' benefits when it implemented its August 15, 1984 proposal without affording the Unions an opportunity to bargain about the matter. The judge dismissed this allegation because there was insufficient evidence to establish that [Howard], in fact, had implemented its August proposal. The General Counsel excepts to this dismissal. In agreeing with the judge, we note that the General Counsel does not dispute that the evidence did not show actual implementation, but, rather, she incorrectly relies on the [Howard's] announced intent to implement the proposal as establishing the unilateral implementation. [citing cases].

See App., *infra*, A29-A30. The NLRB decision is on appeal to the Tenth Circuit; however, the precise issue of non-implementation of the August 15, 1984 proposal, as determined by the NLRB, is not in issue in that appeal. The fact that the proposal was never implemented in now undisputed.

C. The ERISA Claim.

The collective bargaining agreements between Howard and the unions required Howard to make contributions on behalf of its unit employees to the Fund. In May 1986, in the midst of the protracted labor dispute, the Fund issued a withdrawal liability notice letter to Howard, asserting that Howard had ceased contributions to the Fund and that the negotiations with the unions had reached "impasse."[7] Howard disputed the Fund's claims.

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[7] Counsel for the unions during the negotiations with Howard was also counsel for the Fund in the related ERISA proceedings.

Thereafter, as is required under ERISA, 29 U.S.C. § 1399(b)(2)(B), the Fund responded by letter dated September 20, 1986, wherein its legal position on Howard's alleged withdrawal liability was presented. The Fund's counsel claimed that withdrawal liability was based on the alleged "impasse" in collective bargaining that occurred on or about August 15, 1984, when Howard allegedly implemented changes in benefits which included "the cessation of any payments of pension benefits."[8] Because that issue was pending before the NLRB, Howard did not seek arbitration of the union's withdrawal liability claim under ERISA, 29 U.S.C. § 1401(a).

Later, the Fund filed a complaint in federal district court, seeking to obtain a judgment for withdrawal liability. The Fund alleged that Howard unilaterally implemented its August 15, 1984, proposal "on or about August 20, 1984, at which time it ceased its obligation to the Fund except with respect to two of its employees, both of whom were terminated by the defendant on December 31, 1984." Amended Complaint, ¶ 16. The Fund alleged that this unilateral implementation of the proposal constituted "withdrawl from the multiemployer pension plan as withdrawal is defined by Sec. 4203(b) of ERISA [29 U.S.C. § 1383(b)]." Amended Complaint, ¶ 17. The Fund averred that it was entitled to a judgment against Howard for unpaid withdrawal liability under

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[8] The Fund's counsel (who is also the unions' labor counsel) continued other argument in the letter asserting the NLRB action in rescinding the Settlement Agreement was further ground for the Fund's withdrawal claim. This assessment position does not involve any technical issue under ERISA, 29 U.S.C. §§ 1381-1399.

ERISA, 29 U.S.C. § 1451. The Fund contended that Howard waived all defenses to withdrawal liability for failing to demand ERISA arbitration of the issue of proposal implementation pending before the NLRB. Amended Complaint, ¶ 20.

Howard answered denying that the trial court had jurisdiction over the matter and asserting that the withdrawal liability proceedings were an impermissible attack on the previously invoked primary jurisdiction of the NLRB. Howard also defended on the ground it had not withdrawn from the plan. Answer to Amended Complaint, First Defense, ¶ 1, and Third and Sixth Defenses.

D. District Court Proceedings

The parties filed cross-motions for summary judgment. The District Court, relying on this Court's decision in *Laborers Health and Welfare Fund v. Advanced Lightweight Concrete Company*, 484 U.S. 539, 108 S. Ct. 830, 98 L. Ed. 2d 936 (1988), granted Howard's motion, holding that the NLRB possessed exclusive jurisdiction over the labor issue upon which the Fund's withdrawal liability claim was predicted. The District Court held:[9]

> The unfair labor practice charges brought by the unions directly relate to, and indeed control, the question of whether there was a permanent underlying termination of an obligation to contribute under the plans within the meaning of 29 U.S.C. § 1383. It is this court's conclusion that the enactment of the requirement for arbitration

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[9] *See* District Court opinion, App., *infra*, A23.

> in Section 1401(a) was not intended to supersede or supplant the authority of the NLRB under the NLRA and that the unfair labor practice charges brought by the unions and still pending before the NLRB are matters for which the NLRB has exclusive jurisdiction and preclude this court from proceeding in this matter.[10]

Since the District Court granted Howard's motion for summary judgment and held that the NLRB had jurisdiction over the matter, it did not rule upon the Fund's motion.

E. The Tenth Circuit Decision

The Tenth Circuit reversed. It held that the District Court had jurisdiction, that the NLRB primary jurisdiction doctrine was not applicable, and that Howard had waived all defenses to withdrawal liability by failing to initiate ERISA arbitration of the claim that it had withdrawn from the Fund by implementing the bargaining proposal. Rather than remanding this case for further proceedings in the District Court, the Tenth Circuit remanded the case with instructions that the District Court enter judgment in favor of the Fund. The Tenth Circuit admitted that its decision was "draconian" because the NLRB had by that time held that Howard's

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[10] *Id.* At the time the District Court issued its decision, only the initial decision of the administrative law judge of the NLRB had been rendered. It is for this reason that the District Court referred to the NLRB proceedings as "pending." The NLRB charges had been filed and were pending some two years before the withdrawal liability claim of the Fund was filed.

bargaining proposal had not been implemented, and thus, the triggering event for ERISA withdrawal liability had never occurred.

REASONS FOR GRANTING THE PETITION

A. The Tenth Circuit's Decision is Contrary to *Advanced Lightweight* and Other Decisions of this Court Establishing the Primary Jurisdiction of the NLRB, and Threatens Established National Labor Policy.

1. The Decision Rejects the Primary Jurisdiction Doctrine.

The unprecedented Tenth Circuit decision disregards the longstanding doctrine that the NLRB is vested with primary jurisdiction to adjudicate NLRA labor dispute issues. The decision announces a rule that even though pending NLRB proceedings join the exact labor law issues upon which the assertion of withdrawal liability is based, the NLRB simply does not have primary jurisdiction to decide the issues. Rather, the decision holds that labor law issues must be simultaneously presented to an ERISA arbitrator, who has no labor law expertise, and that the NLRB and ERISA arbitration proceedings must then proceed on parallel tracks, with an obvious waste of private and judicial resources and with considerable risk of inconsistent decisions. The decision concludes that notwithstanding the NLRB's decision holding that Howard did not implement the proposal, and thus, did not withdraw, Howard must pay a $555,000 windfall to the Fund as a penalty for not initiating duplicative arbitration of that issue.

The Tenth Circuit decision, rejecting the doctrine of primary jurisdiction, conflicts with the historic decisions of this Court espousing the rule of tribunal deference to the primary jurisdiction of the NLRB. *See, e.g., Myers v. Bethlehem Shipbuilding Corp., Ltd.*, 303 U.S. 41, 50-51, 58 S. Ct. 459, 82 L. Ed. 638, 644 (1938) (jurisdiction of the NLRB under the Act is exclusive and must be exhausted before any other judicial relief may be sought); *Garner v. Teamsters Union*, 346 U.S. 485, 490-91, 74 S. Ct. 161, 98 L. Ed. 228, 239-40 (1953) (Congress established a rule for "any tribunal competent to apply law generally to the party." That rule precludes determinations in "labor controversies" by a "multiplicity of tribunals" and confides primary jurisdiction for same to the NLRB); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, 79 S. Ct. 773, 3 L. Ed. 2d 775, 783 (1959) (state and federal courts "must defer" to the primary jurisdiction, the "exclusive competence" of the NLRB, when an activity is arguably subject to Section 7 or 8 of the act [Unfair Labor Practice Section 8(a)(5), as in the instant case here] if the "danger" of interference with national labor policy is to be averted); *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 391, 106 S. Ct. 1904, 90 L. Ed. 2d 389, 401 (1986) ("Since *Garmon* . . . we have also reaffirmed . . . a determination that in enacting the NLRA, Congress intended for the Board generally to exercise exclusive jurisdiction in this area").

This Court has previously ruled in another labor relations act context, NLRA Section 301, that once the NLRB has already assumed initial jurisdiction but has not yet made a ruling, federal courts are precluded from

assuming jurisdiction. *See South Prairie Const. Co. v. Operating Eng's*, 425 U.S. 800, 96 S. Ct. 1842, 48 L. Ed. 2d 382 (1976) (per *curiam*). In that case, this Court held that a federal circuit court lacked jurisdiction, on appeal of an NLRB decision, to make an initial determination of which set of employees constituted the appropriate bargaining unit under the NLRA, 29 U.S.C. § 159(b). This Court held that the case must be remanded to the NLRB for its initial determination. There is no conceptual distinction between district court initial consideration of an NLRA representational issue under § 301(a) and consideration of an NLRA unfair labor practice issue under § 8(a)(5). Both fall within the primary jurisdiction rule.

2. The Decision Conflicts with *Advanced Lightweight.*

The Tenth Circuit decision, furthermore, is in conflict with this Court's opinion in *Advanced Lightweight, supra,* upon which the district court relied in dismissing the case. This Court there discussed the accommodation that Congress and the courts require between the NLRA and ERISA. This Court carefully instructed that in any case involving previously filed unfair labor practice charges, ERISA procedures will normally defer to the primary jurisdiction of the NLRB under the federal labor policy:

> [W]hether an employer's unilateral decision to discontinue contributions to a pension plan [permanent withdrawal] constitutes a violation of the statutory duty to bargain in good faith is the kind of question that is routinely resolved by the administrative agency with expertise in labor law. There are situations in which district

> judges must occasionally resolve labor issues, but they surely represent the exception rather than the rule. In cases like this [post-contract expiration, labor law cases] which involve either an actual or an "arguable" violation of § 8 of the NLRA, federal courts typically defer to the judgment of the NLRB. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).[19]

484 U.S. at 552.[11] *Advanced Lightweight* involved delinquent contributions, and not withdrawal liability. Nevertheless, this Court made it clear that ERISA claims involving contested unfair labor practice charges, even in the context of withdrawal liability claims, would be subject to the primary jurisdiction of the NLRB. The Tenth Circuit's opinion is thus in direct conflict with this Court's careful instructions in *Advanced Lightweight*.

The danger of parallel NLRB and ERISA proceedings, which join the exact same labor law issue, can be no better demonstrated than by the facts of this case. Here,

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[11] This Court continued as follows in footnote 19:

> It is true, as petitioners point out, that district courts may find it necessary to decide whether an impasse occurred in withdrawal liability cases in which there is a dispute over the date of withdrawal. In such a proceeding, however, there would not normally be any *claim that the employer was guilty of an unfair labor practice* or that liquidated damages were mandated because the employer misjudged the impasse date. (Emphasis added.)

This Court's instructions show that when there is a "claim that the employer was guilty of unfair labor practice," the district court should defer to the primary jurisdiction of the NLRB. The District Court here followed these instructions but was reversed for doing so.

the NLRB proceedings were initiated by unfair labor practice charges in 1984, which went to hearing in 1987. The ERISA withdrawal liability notice letter to Howard was issued in May 1986, long after the NLRB jurisdiction had been invoked. Arbitration here would have to have been invoked in 1986, years before the Board issued its final decision in 1989. The arbitrator would have heard and decided the case of whether Howard had implemented its bargaining proposal, notwithstanding the previously invoked Board procedures, at the time when no NLRB decisions had been entered.

The Tenth Circuit simply ignored the NLRB's primary jurisdiction here, despite that Court's acknowledgement that the only source of any "obligation" of Howard to pay ERISA withdrawal liability was under the NLRA, App., *infra,* A10. It erroneously distinguished this Court's decision in *Advanced Lightweight, supra,* on the alleged ground it was limited to:

> The narrow category of suits seeking recovery of unpaid [noncontractual] contributions accrued during the period between contract expiration and [bargaining] impasse.

App., *infra,* A13. *Advance Lightweight* is not so limited; instead, this Court's instructions explicitly apply to withdrawal liability cases as well. *Id.* 484 U.S. at 552 and n. 19.

The Tenth Circuit did not further review the issue of the NLRB's primary jurisdiction. Instead it held that the withdrawal liability claim "rests upon a separate cause of action specially created by Congress, 29 U.S.C. § 1381." App., *infra,* A13. That holding conflicts with the Court's own previous statement that Howard's "obligation," if

any, was derived solely under the NLRA. It also is simply wrong, as this Court carefully instructed in its decision in *Advanced Lightweight, supra*. This Court instructed that the withdrawal liability claim is grounded solely on the NLRA-created cause of action. First, that withdrawal liability (specifically not referring to delinquent payments liability) in the post-contract period may arise only on a duty created under "applicable labor-management relations law." *Advanced Lightweight, supra*, 484 U.S. at 546, 549, ns. 11 and 16. That duty is part of a "broader labor law duty" which was "created to protect the collective bargaining process." *Id.* at 553. The withdrawal liability statute makes this clear itself, this Court stated, in § 4212(a), 29 U.S.C § 1392(a).[12] *Id.* at 546, n. 11.

Thus, as this Court held, the NLRA basis for the subsequently raised ERISA claim requires application of the doctrine of the NLRB's primary jurisdiction when previously filed unfair labor practice charges indicate "a good-faith dispute over both the existence and extent of the employer's liability" in the context of an alleged "violation of the statutory duty to bargain in good faith." *Id.* at 552.

Paradoxically, the Court of Appeals concluded that the District Court correctly found that the NLRB findings would control a withdrawal liability claim before an ERISA arbitrator, and that "both the arbitrator and the district court on review would be obligated to accord *collateral estoppel* effect to the NLRB's findings." App., *infra*, A17. However, the Tenth Circuit also held that the

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[12] App., *infra*, A147.

arbitrator in that instance would still have discretion to proceed with the arbitration while the NLRB proceedings were pending. Here, accordingly, no *collateral estoppel* effect could be given. No NLRB decisions had yet been entered.[13] There could be no deferral to the NLRB. The NLRA issues, including the issue of whether the NLRB had primary jurisdiction, would have been effectively subjugated to a decision by an arbitrator with no expertise in the developing national labor law and policy. This is the very conflict between tribunals that the NLRB primary jurisdiction doctrine was designed to avoid.[14]

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[13] Since no NLRB decision existed at the time, *collateral estoppel* could not have been applied. To be given *collateral estoppel* effect the agency decision must be "final and conclusive." *United States v. Utah Const. & Min. Co.*, 384 U.S. 394, 420, 86 S. Ct. 1545, 16 L. Ed. 2d 642, 660 (1966); *Frye v. United Steel Workers of America*, 767 F.2d 1216, 1220-1221 (7th Cir. 1985), *cert. denied*, 474 U.S. 1007, 106 S. Ct. 530, 88 L. Ed. 2d 461 (1985) (*collateral estoppel* effect properly given to NLRB decision on issues "actually litigated and determined by a valid and final judgment," citing 1 *Restatement (Second) of Judgments* 827 (1982)).

[14] Unlike the Tenth Circuit, the Ninth Circuit has properly recognized the NLRB's primary jurisdiction when it affirmed the district court's decision which adopted the NLRB's determinations to resolve a related withdrawal liability claim under ERISA, *without arbitration*. *See Cuyamaca Meats v. San Diego & Imperial Counties, Butcher and Food Employers' Pension Trust Fund*, 827 F.2d 491 (9th Cir. 1987).

The issue of NLRB primary jurisdiction neither arises under ERISA nor falls within its arbitration provisions. ERISA, 29 U.S.C. § 1401, requires arbitration of "any dispute" under particular sections of ERISA, 29 U.S.C. §§ 1381-1399. *See* App., *infra*, A142-A158. Those sections set forth "technical

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3. The Decision Threatens National Labor Policy.

The withdrawal liability claim was simply a punitive weapon filed during and as a part of the labor dispute. The Fund's counsel, who was also the unions' counsel, claimed that the "determination of withdrawal liability" for Howard was based on the alleged "unilateral implementation" of the "August 15, 1984" proposal. The claim was an effort to circumvent NLRB procedures and established remedies and to force ERISA withdrawal liability penalties for alleged unfair labor practice conduct, despite the NLRB's pending jurisdiction and its subsequent finding that no such unlawful conduct occurred.[15] The Tenth Circuit decision gives unions and their allied

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provisions" describing "how and when withdrawal liability is to be assessed." *C. Colteryahn Diary v. Teamsters & Emp. Pension F.*, 847 F.2d 113, 118 (3d Cir. 1988). They cover sales of assets, adjustments for partial withdrawals, di minimus exceptions, suspension of contributions, and various "accepted methods for calculating the assessment itself." *Id.* In *C. Colteryahn Dairy*, ERISA arbitration was excused in the context of a claim that an employer was fraudulently induced to participate in a fund, since the issue did not involve a "determination made under" the cited ERISA provisions. Similarly, a dispute concerning the NLRB's primary jurisdiction is not a dispute about matters covered by 29 U.S.C. §§ 1381-1399. The interplay between those provisions and the NLRA was resolved in favor of the NLRB's primary jurisdiction in *Advanced Lightweight*, 484 U.S. at 552.

[15] Undisputedly, the NLRB has the power to remedy employer unlawful collective bargaining conduct in refusing to continue contributions to the Funds. *See Advanced Lightweight, supra*, 484 U.S. at 552-553; *Manhattan Eye, Ear & Throat Hospital*, 300 NLRB No. 24, 135 LRRM 1177 (Sept. 28, 1990); *Roman Iron Works*, 292 NLRB No. 142, n. 15, 131 LRRM 1647 (Feb. 27, 1989).

pension funds a weapon not intended under ERISA and plainly inconsistent with the NLRA, to force small employers like Howard to agree to their demands at the bargaining table or face results which the Tenth Circuit itself terms "draconian." This interference with national labor policy cannot be permitted. As this Court stated in *Advanced Lightweight,* the ERISA procedures were not "provided" by Congress as another way to obtain "redress for an employer's [alleged] violation of its duty to bargain with the union." 484 U.S. at 553.[16] Review by this Court is necessary to preserve the primary jurisdiction of the NLRB and to prevent this disruption of labor relations and collective bargaining throughout the United States.

B. The Tenth Circuit, in Conflict With Other Circuits, Required the Employer to Submit the Legal Issue of the Arbitrator's Jurisdiction to Arbitration Rather than to Federal Court.

The Tenth Circuit decision creates a new mandatory ERISA arbitration standard which is harsh, rigid and inflexible. This new absolute bar rule, moreover, conflicts with decisions of other Courts of Appeal in not applying exceptions to the exhaustion of administrative remedies doctrine. The Tenth Circuit denied Howard's Petition For Rehearing which requested application of exceptions to

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[16] Congress in enacting the MPPAA amendments to ERISA expressly authorized an employer to suspend fund contributions during a labor dispute with its employees, which is further evidence that ERISA was not intended to provide additional weapons to unions and their allied pension funds during labor disputes. *See* 29 U.S.C. § 1398(2).

exhaustion in view of the Court's unprecedented decision, and which requested remand to the District Court for that purpose. The Tenth Circuit instead blindly adhered to arbitration despite conflicting decisions of other appellate courts holding that arbitration in these circumstances does not advance any significant ERISA policy and is not required. The decision simply produces a "draconian" penalty to Howard and a $555,000 windfall to the Fund for a claimed withdrawal which the NLRB has held did not occur.

The Tenth Circuit decision expressly recognized that ERISA arbitration "is not an absolute jurisdictional bar." App., *infra*, A14. But the Court, in conflict with decisions of other appellate courts excusing the exhaustion of that administrative remedy, held that arbitration here indeed was an absolute bar to Howard's right to defend the ERISA complaint. "[A]rbitration reigns supreme," the Court held, App., *infra*, at A15, and:

> By failing to arbitrate, an employer thus waives any defenses to collection actions [for asserted ERISA withdrawal liability] that could properly have been heard before the arbitrator.

App., *infra*, A15.

Contrary to the Tenth Circuit's admonition that "arbitration reigns supreme," other appellate courts have held that when legal issues concern a jurisdictional question (in the context of statutory interpretation) the issue need not be submitted to arbitration. *See Central Transport, Inc. v. Central States, S.E. and S.W. Areas Pension Fund*, 816 F.2d 678 (6th Cir. 1987) (per *curiam* affirming 639 F. Supp. 788 (E.D. Tenn. 1986)), *cert. denied*, 484 U.S. 926, 108 S. Ct. 290, 98 L. Ed. 2d 250 (1987); *Mason and*

Dixon Tank Lines v. Central States, etc., 852 F.2d 156, 167 (6th Cir. 1988) (jurisdictional issue whether the company was a covered employer under ERISA was held not arbitrable); *Carrier's Container Council v. Mobile S.A. Assoc.*, 896 F.2d 1330, 1345 (11th Cir. 1990) (where the court affirmed the summary judgment decision of the trial court on the merits of withdrawal claim in a declaratory judgment action, holding that jurisdictional issue of employer status was not within arbitration expertise, arbitration would not serve goal of judicial economy, and arbitration would not help develop the factual record). The same result obtains for "facial constitutional attack," or even a "verifiable claim of irreparable injury." *See Mason and Dixon Tank Lines, supra*, at 165. *See also Central States, S.E. and S.W. Areas Pension Fund v. T.I.M.E. D.C., Inc.*, 826 F.2d 320, 327-328 (5th Cir. 1987).

In other legal contexts, federal appellate courts also recognize exceptions to the duty to exhaust the "administrative remedy" of ERISA arbitration.[17] In *Park*

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[17] The exhaustion of remedies analysis which is the standard for measuring ERISA arbitration requirements can be significantly traced to this Court's decision in *McKart v. United States*, 395 U.S. 185, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969). *McKart* was a Selective Service Act case involving "premature" resort to the courts and petitioner's failure to appeal his Selective Service reclassification. This Court refused to apply the exhaustion doctrine and held the failure to appeal did not bar petitioner's court challenge to the validity of his reclassification. This Court in its decision announced rationales supporting the exhaustion doctrine, failing which the doctrine would not be applied:

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South Hotel v. New York Hotel Trades Council, 851 F.2d 578 (2nd Cir. 1988), *cert. denied*, 488 U.S. 966, 109 S. Ct. 493, 102 L. Ed. 2d 530 (1988), a partnership was signatory to a labor agreement which required it to contribute to a multiemployer pension fund. When the partnership later sold its interest to a successor (Donald Trump), who continued to recognize the union and labor agreement, and who continued payments to the fund, the fund contended that the mere sale of partnership interest was a withdrawal under ERISA. The parties did not seek arbitration, and instead litigated the issue in federal district court. The court held the sale constituted a withdrawal, but the Court of Appeals reversed. It did affirm the district court, however, in concluding that ERISA arbitration was not required:

> In the present case, we conclude that exhaustion of the arbitration remedy is not required because (1) this case presents no factual issues but only legal questions of statutory interpretation, (2) the parties agreed that arbitration was

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(1) Avoidance of premature interruption of the administrative process;

(2) Deference to application of special agency expertise;

(3) Deference to administrative autonomy – to allow the agency to have first opportunity to correct its own errors;

(4) Development of the factual record by the agency.

395 U.S. at 193-195. Not one of these exhaustion requirements is applicable here.

> not required, (3) the suit was filed before the time for invoking arbitration had expired, and (4) judicial economy would not be served by remanding the case at this late stage for arbitration, which almost certainly would be followed by further judicial proceedings.

851 F.2d at 582. Here, the case similarly presents such a legal issue, Howard was already litigating the case before the NLRB, the proper forum, when the alleged arbitration duty arose, and thus was timely proceeding in that forum. Judicial economy would not have been served by arbitration, since the NLRB already had the case, and further judicial proceedings certainly would have followed any arbitration.

Similarly, in *Dorn's Transp. v. Teamsters Pension Trust Fund*, 787 F.2d 897 (3d Cir. 1986), the employer sold its stock to another employer that assumed its operations and employees, and continued fund payments through the purchasing employer's own labor agreement involving the identical pension fund. The Court held that the legal issue of the effect of this sale for ERISA withdrawal liability purposes was not subject to arbitration. In affirming the district court's decision in the declaratory judgment action, the appellate court held:

> . . . [T]here is no *per se* exhaustion requirement under which this court lacks jurisdiction to hear cases that have not first been before an arbitrator.

787 F.2d at 903. The court continued that where arbitration "would be of little use," such as an issue where the arbitrator would not have "special expertise," or where arbitration would not "moot further proceedings" and would not serve the goal of "judicial economy," and

would not "help develop a fuller factual record" to assist the court, then "arbitration may be bypassed. . . . " 787 F.2d at 903. The court concluded:

> As this was a rare case in which there was no need for the development of a factual record, we do not believe the district court abused its discretion in . . . bypassing arbitration.

Id.[18]

What this case has in common with these other cases in which arbitration has been excused is that arbitration would not further any purpose underlying the doctrine of exhaustion of administrative remedies. In this case, arbitration would not assist in developing a factual record utilizing any special expertise of an arbitrator which would moot any further proceedings and result in judicial economy. The District Court here could resolve the jurisdictional issue without any need for further factual proceedings, and indeed, in recognition of the pending administrative proceedings which would be "on the record" before the NLRB. The arbitrator here had no special expertise in the context of this NLRB primary jurisdictional issue, and arbitration would certainly not promote judicial economy. Indeed, arbitration would simply proliferate a third tribunal to hear the case and raise the clear risk of inconsistent decisions. In direct conflict,

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[18] *See also Cuyamaca Meats v. San Diego & Imperial Counties, Butcher and Food Employers' Pension Trust Fund*, 827 F.2d 491 (9th Cir. 1987) when the court, without arbitration, relied upon the prior NLRB determination to supply the factual basis for proper withdrawal date determinations.

the Tenth Circuit decision precludes this reliance on the NLRB's jurisdiction and decision.

The Tenth Circuit decision precludes any use in this case of any exception to the exhaustion doctrine. Contrary to the cited decisions of appellate courts which squarely recognize exceptions to the exhaustion doctrine under ERISA, the Tenth Circuit has blindly adopted a harsh, rigid rule that Arbitration Reigns Supreme and is an absolute jurisdictional bar to Howard's recognized ERISA jurisdictional defense. Indeed, the NLRB decision conclusively, irrefutably, establishes Howard's defense that it did *not* implement the bargaining proposal, that the triggering event for withdrawal liability did *not* occur, and that Howard did not withdraw from the Fund. No better case calling for an exception to the exhaustion doctrine can be imagined than the undisputed facts of this case.

Here, the legal issue of the NLRB's primary jurisdiction squarely met the exceptions noted to application of the exhaustion of remedies doctrine. Howard was already litigating the issue before the NLRB when the withdrawal liability claim was asserted, and was timely exercising its NLRB defenses. The Tenth Circuit need not have created its new rule of absolute jurisdictional bar but, rather, should have followed the existing law developed by the federal appellate courts and simply excused arbitration.

C. The Tenth Circuit Decision Conflicts With the Decisions of Other Circuits and this Court Applying the Doctrine of Equitable Tolling.

The appellate courts have also agreed on another doctrine excusing arbitration, namely, the doctrine of

equitable tolling. Under this doctrine, arbitration of withdrawal liability is deferred or delayed, pending resolution of issues not suited for ERISA arbitration in another appropriate forum. For example, in *Banner Indus., Inc. v. Central States, S.E. and S.W. Areas Pension Fund*, 875 F.2d 1285 (7th Cir.), *cert. denied*, ___ U.S. ___, 110 S. Ct. 563, 107 L.Ed.2d 558 (1989), an employer assessed with withdrawal liability by the fund did not demand ERISA arbitration. Instead, the employer filed a declaratory action in district court, a proper forum for such litigation in the employer's view, arguing that it was not an "employer" subject to the arbitrator's jurisdiction. The federal court eventually held that the "employer" issue is itself subject to arbitration under ERISA, and that the employer should have invoked arbitration. The Court of Appeals for the Seventh Circuit nevertheless upheld the district court's determination that the arbitration period should be equitably tolled:

> [T]he issues presented question the arbitrator's authority to bind the parties. When the question is whether one of the parties falls within the arbitrator's jurisdiction, fairness considerations mandate that the deadline for arbitration be tolled until determination is made that the party is subject to mandatory arbitration. The district court recognized that this Banner issue had not been definitively decided previously.

875 F.2d at 1291-1292. *See Republic Indus., Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628, 644 (4th Cir. 1983) (arbitration period equitably tolled when employer made a "not frivolous" challenge to constitutionality of statute and jurisdiction of arbitrator); *The Flying Tiger Line Inc. v. Central States, S.W. and S.E. Areas*

Pension Fund, 659 F. Supp. 13 (D. Del. 1986), *aff'd* 830 F.2d 1241, 1246-1247, 1256 (3d Cir. 1987) (arbitration period equitably tolled in declaratory action in federal court where company argued it was not an "employer" in federal court and contended that its status as "employer" should be judicially determined, even though claim was rejected and arbitration was ordered); *Trustees of Chicago Truck Drivers, Helpers and Warehouse Workers' Union (Indep.) Pension Fund v. Central Trans., Inc.*, 888 F.2d 1161, 1165 (7th Cir. 1989) (trustees' filing of claim in bankruptcy equitably tolled the period in which the employer was required to demand arbitration of subsequently asserted withdrawal liability claim, even though the trustees, and not the employer filed the claim in bankruptcy, and where arbitration was never initiated and no separate court action to contest arbitration was ever filed).[19]

The decision of the Tenth Circuit significantly conflicts with these decisions of other appellate courts

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[19] The equitable tolling doctrine has also been applied by a number of district courts in the context of ERISA. *See Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Central Michigan Trucking, Inc.*, 698 F. Supp. 698 (W.D. Mich. 1987) (equitable tolling applied to ERISA arbitration requirement); *Trustees of the Chicago Truck Drivers, Helpers and Warehouse Worker's Union (Indep.) Pension Fund v. Chicago Kansas City Freight Line, Inc.*, 694 F. Supp. 469 (N.D. Ill. 1988) (arbitration period equitably tolled even though employer did not file declaratory judgment action in federal court); *Robbins v. Pepsi-Cola Metro. Bottling Co.*, 636 F. Supp. 641, 679 n. 53 (N.D. Ill. 1986) (challenge to constitutionality of ERISA in federal court did not result in waiver of right to invoke ERISA arbitration).

holding that arbitration may be tolled in difficult cases like this.

After the Tenth Circuit issued its decision, Howard petitioned for rehearing, arguing that, at a minimum, the Tenth Circuit should remand the case to the District Court to allow it to consider whether the doctrine of equitable tolling should be applied given the unique facts of this case and the Court's unprecedented decision regarding the NLRB's primary jurisdiction. *See* App., *infra*, A121-141. The Tenth Circuit, however, after requesting that the Fund file a reply brief, summarily and without comment denied Howard's petition. *See* App., *infra*, A119. It remanded the case with directions that the District Court enter judgment in favor of the Fund. In so doing, the Tenth Circuit *sub silento* rejected the doctrine of tolling in the context of ERISA, creating a conflict with every other circuit which has considered the issue.

The proper appellate disposition when a question of equitable tolling has not been addressed by the district court is to remand the matter for further proceedings in that court. In *DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 172, 103 S. Ct. 2281, 2294, 76 L. Ed. 2d 476, 494 (1983), this Court held:

> Petitioner DelCostello contends, however, that certain events operated to toll the running of the statute of limitations until about three months before he filed suit. Since the district court applied a 30-day limitations period, it expressly declined to consider any tolling issue. 524 F. Supp. at 725. Hence, the judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

See also Pullman-Standard v. Swint, 456 U.S. 273, 291, 102 S. Ct. 1781, 72 L. Ed. 2d 66, 81-82 (1982); *Martin v. Pullman*

Standard, 726 F.2d 101, 102 (3d Cir. 1984) (district court's failure to determine if equitable tolling applied required appellate remand for consideration of said issue).

The Tenth Circuit need not have issued the decision creating a new harsh rule of absolute jurisdictional bar. In light of its decision on the merits, the Tenth Circuit should have adopted the doctrine of equitable tolling and remanded the matter to the District Court for review. By this procedure, a decision in conflict with other appellate courts would have been avoided and the "draconian" penalty of a "default" payment to the funds of some $555,000 where no withdrawal in fact occurred would not have resulted.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

EARL K. MADSEN*
JIM MICHAEL HANSEN
BRADLEY, CAMPBELL, CARNEY & MADSEN
1717 Washington Avenue
Golden, Colorado 80401-1994
(303) 278-3300

*Counsel of Record

No. _____

In The

Supreme Court of the United States

October Term, 1990

HOWARD ELECTRICAL & MECHANICAL, INC., and HOWARD SYSTEMS, INC.,

Petitioners,

v.

TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST, an express trust,

Plaintiff-Appellant,

and

TRUSTEES OF COLORADO PIPE INDUSTRY INSURANCE TRUST, an express trust; PLUMBERS LOCAL UNION NO. 3, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada; and PIPEFITTERS LOCAL NO. 208, United Association of Journeymen and Apprentices of the Plumbing and Pipefittings Industry of the United States and Canada,

Plaintiffs,

vs.

HOWARD ELECTRICAL & MECHANICAL INC., a Colorado Corporation; and HOWARD SYSTEMS, Inc., a Colorado Corporation,

Defendants-Appellees,

and

JACORE, INC., a Colorado Corporation,

Defendant.

No. 88-2938

Filed
MAY 18 1990

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 86-M-2561

James C. Fattor, of Hornbein, MacDonald, Fattor & Hobbs, Denver, Colorado, for Plaintiff-Appellant.

Early K. Madsen, of Bradley, Campbell & Carney, Golden, Colorado, for Defendants-Appellees.

Before SEYMOUR and BALDOCK, Circuit Judges, and SEAY, District Judge.*

BALDOCK, Circuit Judge.

Plaintiff-appellant trustees sought to collect withdrawal liability from defendant-appellee employer for the unions' multiemployer pension fund. The district court dismissed the action for lack of jurisdiction. We hold that the district court had jurisdiction to adjudicate the plaintiff's claim for withdrawal liability, and that the defendants waived their defenses to withdrawal liability by failing to arbitrate. Our jurisdiction over this appeal arises under 28 U.S.C. § 1291. We reverse with instructions to enter summary judgment for the plaintiff.

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* The Honorable Frank H. Seay, Chief Judge, United States District Court for the Eastern District of Oklahoma, sitting by designation.

I.

The Colorado Pipe Industry Pension Fund (the fund) is an express trust established to provide retirement benefits for employees in the plumbing and pipefitting industry in the State of Colorado. The fund operates a multiemployer pension plan[1] as defined under the Employment Retirement Income Security Act, 29 U.S.C. §§ 1001-1462 (ERISA). Defendant-appellee Howard Systems, Inc. is the parent of wholly-owned subsidiary and defendant-appellee Howard Electrical & Mechanical, Inc. (Howard), a Colorado corporation engaged in the construction business. This action between Howard and the trustees arises out of a labor dispute between Howard and Plumbers Local Union No. 3 and Pipefitters Local Union No. 208 (the unions). In our disposition of the instant case, we consider both the dispute between Howard and the unions and the dispute between Howard and the trustees.

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[1] ERISA defines a multiemployer plan as follows:

> The term 'multiemployer plan' means a plan –
>
> (i) to which more than one employer is required to contribute,
>
> (ii) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and
>
> (iii) which satisfies such other requirements as the Secretary may prescribe for regulation.

29 U.S.C. § 1002(37)(A)

Unions' Unfair Labor Practices Action

In May 1981, Howard executed collective bargaining agreements with the unions. Under this agreement, Howard was obligated to contribute to the fund at a specified rate for each hour worked by the unions' members. When the collective bargaining agreement expired in May 1983, Howard and the unions were unable to agree upon a new contract. Paramount among the parties' disagreements was Howard's insistence on hiring "pre-apprentice," non-union employees to perform unit work. In December 1983, Howard presented its "final" offer to the unions, asserted that an impasse existed, and informed the unions that it intended to implement its final offer at the beginning of the new year. Howard hired its first pre-apprentice pipefitter in April 1984 and its first pre-apprentice plumber the following May.

Based upon Howard's unilateral action, the unions brought an unfair labor practice action before the National Labor Relations Board (NLRB). An ALJ concluded that, at the time Howard instituted the unilateral act of hiring pre-apprentice employees, the parties had bargained to a valid impasse;[2] thus under applicable labor law, Howard was entitled to institute unilateral changes in the work place. *Howard Elec. & Mechanical,*

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[2] Parties to labor negotiations reach an impasse at "that point at which [they] have exhausted the prospects of concluding an agreement and further discussions would be fruitless. . . . " R. Gorman, *Basic Text on Labor Law* 448 (1976). Whether an impasse exists is a matter of judgment involving, among other things, the parties' good faith, their bargaining history and the importance of the issue over which disagreement exits. *Id.*

Nos. 27 – CA – 8889, 8889-2, 8924, unpub. order at 37 (NLRB Apr. 8, 1987). However, the NLRB reversed, declining to consider whether Howard and the unions had reached impasse. *See Howard Elec. & Mechanical*, 293 NLRB No. 51, slip op. at 9-11, NLRB Dec. (CCH) ¶ 15,455 (March 29, 1989). Rather, the NLRB found that Howard's hiring of the pre-apprentice employees constituted an unfair labor practice because the unions had not agreed to exclude the pre-apprentice employees from the bargaining unit and NLRB proceedings were never instituted to change the scope of the unit. *Id.* The unions "were not required to bargain about" the scope of the bargaining unit, *id.* at 12; thus, Howard's implementation of its pre-apprentice proposal constitutioned an unfair labor practice, *id.* at 12-13. The NLRB ordered Howard to: 1) restore the status quo existing at the time the collective bargaining agreement expired and 2) resume bargaining with the unions until a new contract was agreed upon or a valid impasse reached.[3] *Id.* at 13.

Trustees' Withdrawal Liability Action

In May 1986, during the pendency of the unions' unfair labor practices action, the trustees informed Howard that it was subject to withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1462 (MPPAA). The trustees calculated Howard's withdrawal liability at $555,852 and demanded payment. Howard did not arbitrate the disputed liability,

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[3] The NLRB's decision currently is on appeal. *NLRB v. Howard, appeal docketed*, No. 89-9532 (10th Cir. May 24, 1989).

a prerequisite to maintaining a defense to withdrawal liability under § 1401 of the MPPAA. The trustees then brought the present action against Howard seeking: 1) postcontract contributions under § 1132(g)(2) of ERISA for contributions accrued after expiration of the collective bargaining agreement and 2) withdrawal liability of $255,032 under § 1381 of the MPPAA.

The trustees moved for summary judgment on the withdrawal liability claim, contending that Howard had waived all defenses to its withdrawal liability by failing to arbitrate, 29 U.S.C. § 1401(b). Howard also moved for summary judgment arguing that, according to the Supreme Court's recent holding in *Laborers Health & Welfare Fund for N. Cal. v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988), the district court lacked jurisdiction over the trustees' action. The trustees conceded that *Advanced Lightweight Concrete* was dispositive of their § 1132(g)(2) claim for postcontract contributions, but contended that the case did not bar federal jurisdiction over the withdrawal liability claim brought under § 1381. The district court, however, dismissed the entire action for lack of jurisdiction holding that "the unfair labor practice charges brought by the unions and still pending before the NLRB are matters for which the NLRB has exclusive jurisdiction and precludes this court from proceeding in this matter." *Trustees of Colo. Pipe Indus. Pension Trust v. Howard Elec. & Mechanical, Inc.*, No. 86-M-2561, unpub. order at 4 (D. Colo. Nov. 28, 1988).

II.

This case requires us to construe the respective jurisdictional bases of two statutory remedies available to multiemployer pension plans: ERISA and the MPPAA. This Circuit has not considered whether a federal court which lacks jurisdiction over an action brought under § 1132(g)(2) of ERISA can nevertheless maintain jurisdiction over an § 1381 action brought under the MPPAA. This jurisdictional issue presents a question of law subject to *de novo* review. *Williams Natural Gas Co. v. Oklahoma City*, 890 F.2d 260 n.7 (10th Cir. 1989).

A.

Congress enacted ERISA, "to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans." *Pension Benefit Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 720 (1984). Toward that end, ERISA creates a statutory obligation requiring that employers contribute to multiemployer plans in accordance with their contractual obligations.[4] 29 U.S.C. § 1145. ERISA also provides

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[4] The statute provides:

§ 1145 Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

trustees of multiemployer plans with a remedy to collect delinquent contributions, plus interest and attorney's fees, from errant employers.[5] 29 U.S.C. § 1132(g)(2).

In 1980, Congress amended ERISA to establish special rules governing multiemployer pension plans. These amendments were necessary because, under ERISA, employers could withdraw from a multiemployer pension plans without paying their share of the unfunded vested benefit liability, thereby threatening the solvency of such plans. *Advanced Lightweight Concrete*, 484 U.S. at

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[5] According to the statute:

> In any action under this title by a fiduciary for or on behalf of a plan to enforce [§ 1145] in which a judgment in favor of the plan is awarded, the court shall award the plan –
>
> (A) The unpaid contributions,
>
> (B) interest on the unpaid contributions,
>
> (C) an amount equal to the greater of –
>
> (i) interest on the unpaid contributions, or
>
> (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),
>
> (D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and
>
> (E) such other legal or equitable relief as the court deems appropriate. . . .

29 U.S.C. § 1132(g)(2).

545; *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1120 (D.C. Cir.), *cert. denied*, 110 S. Ct. 280 (1989); *Woodward Sand Co. v. Western Conference of Teamsters Pension Trust Fund*, 789 F.2d 691, 694 (9th Cir. 1986).

> As enacted, the [MPPAA] requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan. This withdrawal liability is the employer's proportionate share of the plan's 'unfunded vested benefits' calculated as the difference between the present value of vested benefits and the current value of the plan's assets. 29 U.S.C. § 1381, 1391.

Gray, 467 U.S. at 725. The MPPAA empowers trustees of multiemployer plans to maintain actions for withdrawal liability and vests federal court with jurisdiction over such disputes.[6] 29 U.S.C. § 1451(a) & (c).

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[6] The statute provides in pertinent part:

§ 1451 Civil Actions

(a) Persons entitled to maintain actions. (1) A plan fiduciary . . . who is adversely affected by the act or omission of any party under this subtitle [29 U.S.C. §§ 1381 et seq.] with respect to a multiemployer plan . . . may bring an action for appropriate legal or equitable relief, or both.

. . .

(c) Jurisdiction of Federal and State Courts. The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

Under the MPPAA, an employer becomes subject to withdrawal liability once it "permanently ceases to have an obligation to contribute" to a multiemployer pension fund.[7] 29 U.S.C. § 1383(a)(1). "[T]he term 'obligation to contribute' means an obligation arising – (1) under one or more collective bargaining (or related) agreements, or (2) as a result of a duty under applicable labor-management relations law. . . . " 29 U.S.C. § 1392(a). Under § 1392(a)(1), the employer's obligation to contribute arises from contractual agreements requiring the employer to contribute to a multiemployer fund. Once such a contact [sic] expires, the employer no longer has an obligation to contribute under § 1392(a)(1). *See Woodward Sand*, 789 F.2d at 695. An employer's obligation to contribute under § 1392(a)(2) derives from the employer's statutory duty to maintain the status quo after the expiration of a collective bargaining agreement to "promote[ ] industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations of a new contract." *Advanced Lightweight Concrete*, 484 U.S. at 544 n.6 (quotations omitted).

Pursuant to the National Labor Relations Act, 29 U.S.C. §§ 141-197 (NLRA), an employer's abrogation of terms and conditions of an expired collective bargaining agreement during negotiation of new agreement may constitute an unfair labor practice. *See, e.g., NLRB v. Katz*,

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[7] An employer may, however, suspend contributions to a multiemployer plan during a labor dispute without incurring withdrawal liability under the MPPAA. 29 U.S.C. § 1398(2). Moreover, if an employer rejoins a multiemployer plan after previously withdrawing, its liability is subject to abatement. 29 U.S.C. §§ 1387, 1388.

369 U.S. 736, 743 (1962). Thus, where an employer has an obligation to contribute to a pension plan under a collective bargaining agreement, the NLRB may obligate the employer to continue contributing to the fund after the contract has expired. *See Advanced Lightweight Concrete*, 484 U.S. at 543-44 n.5 & 6; *Woodward Sand*, 789 F.2d at 695. So long as an employer is required to contribute to a multiemployer pension plan by the NLRA, it maintains an obligation to contribute under § 1392(a)(2) of the MPPAA. Consequently, absent a procedural default, the employer cannot be assessed for withdrawal liability. An employer ceases to have an obligation to contribute under § 1392(a)(2) of the MPPAA once it bargains to impasse with its employees' unions. Once impasse is reached between the parties, an employer's NLRA-imposed duty to maintain the status quo during post-contract negotiations is extinguished, *Advanced Lightweight Concrete*, 484 U.S. at 543 n.5 (citing *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1960)), and the employer may take reasonable unilateral action without violating the NLRA, *Newspaper Printing Corp. v. NLRB*, 625 F.2d 956, 966 (10th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981); *Rozay's Transfer v. Local Freight Drivers, Local 208*, 850 F.2d 1321, 1332 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1768 (1989).[8]

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[8] Even upon reaching impasse, an employer's obligation to contribute is not extinguished under the MPPAA where the employer is otherwise contractually bound. *See e.g., Cuyamaca Meats v. San Diego & Imperial Counties Butchers' & Food Employers' Pension Trust Fund*, 827 F.2d 491, 497-99 (9th Cir. 1987) (where employer expressly contracted to continue contributing to pension fund through August, the fact that the

(Continued on following page)

B.

The district court held that *Advanced Lightweight Concrete* posed a jurisdictional bar both to adjudication of the trustees' action for postcontract contributions and their claim for withdrawal liability. In *Advanced Lightweight Concrete*, a pension fund sought postcontract contributions under § 1132(g)(2) of ERISA, based upon an employer's failure to maintain the status quo. 484 U.S. at 542. The Supreme Court noted that the employer's postcontract obligation to contribute was derived, not from ERISA, but from the NLRA. *Id.* at 545-46. The Supreme Court therefore held that, under § 1132(g)(2) of ERISA, original federal jurisdiction was limited to actions for contractual contributions; contributions owed solely as a result of a noncontractual statutory duty to maintain the status quo properly are sought initially in an action before the NLRB. *Id.* at 548-49. *See, e.g., Central States Pension Fund v. Behnke, Inc.*, 883 F.2d 454, 464 (6th Cir. 1989) (where pension plan trustees' § 1132(g)(2) action against employer for postcontract contributions arose from independent contractual promise in interim agreement, the district court properly exercised jurisdiction under *Advanced Lightweight Concrete*).

In the instant case, the trustees sought noncontractual contributions under § 1132(g)(2) of ERISA for the period after the expiration of the collective bargaining agreement between Howard and the unions. The only

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(Continued from previous page)

parties reached impasse in May did not extinguish employer's obligation to contribute triggering employer withdrawal liability before August), *cert. denied*, 485 U.S. 1008 (1988).

source of Howard's obligation to make these payments was the NLRA requirement that it maintain the status quo during the period of negotiation before impasse. Therefore, as conceded by the trustees, *Advanced Lightweight Concrete* poses a jurisdictional bar to adjudication of their § 1132(g)(2) action in district court.

The district court also held that *Advanced Lightweight Concrete* precluded federal jurisdiction over the trustees' action for MPPAA withdrawal liability. We disagree. *Advanced Lightweight Concrete* involved the "narrow category of suits seeking recovery of unpaid [noncontractual] contributions accrued during the period between contract expiration and [bargaining] impasse." *Laborers Health & Welfare Trust Fund v. Advance Lightweight Concrete Co.*, 779 F.2d 497, 505 (9th Cir. 1985), *aff'd*, 484 U.S. 539 (1988). The employer's liability in *Advanced Lightweight Concrete* for postcontract contributions was predicated upon a generalized duty imposed by the NLRA to maintain the status quo. In contrast, Howard's withdrawal liability rests upon a separate cause of action specially created by Congress, 29 U.S.C. § 1381. In *Advanced Lightweight Concrete*, by relying entirely upon ERISA to support federal jurisdiction, 484 U.S. at 543 n.4, plaintiffs essentially were attempting to hitch a remedial ERISA wagon to a NLRA horse. Here, Congress has created a distinct federal remedy – withdrawal liability – and explicitly vested federal courts with jurisdiction to adjudicate such claims. 29 U.S.C. § 1451(c). *See Central States Southeast & Southwest Areas Pension Fund v. Houston Pipe Line Co.*, 713 F. Supp. 1257, 1253 n.9 (N.D. Ill. 1989) (claim for withdrawal liability "cannot remotely be deemed an unfair labor charge" bared under *Advanced Lightweight Concrete*).

Although impasse usually is an issue determined by the NLRB in an unfair labor practices charge, district courts may "find it necessary to decide whether an impasse occurred in withdrawal liability cases in which there is a dispute over the date of withdrawal." *Advanced Lightweight Concrete*, 484 U.S. at 552 n.19. *See, e.g., Woodward Sand*, 789 F.2d at 695 (remanding MPPAA action to district court for determination of whether an impasse had been reached); *I.A.M. Nat. Pension Fund Benefit Plan C v. Schulze Tool & Die Co.*, 564 F. Supp. 1285, 1296-98 (N.D. Cal. 1983) (granting summary judgment in MPPAA action on question of impasse). Although this determination technically presents a labor law question, impasse is an issue collateral to the independent federal remedy of withdrawal liability and does not therefore defeat federal jurisdiction. *See Advanced Lightweight Concrete*, 484 U.S. at 543 n.4; *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 626 (1975) ("federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies.").

III.

Having held that the district court had jurisdiction to adjudicate the trustees' MPPAA action against Howard for withdrawal liability, we now must consider the effect of Howard's failure to arbitrate. Federal courts presented with the question of whether arbitration is required under the MPPAA uniformly have addressed the question as an issue of exhaustion of administration remedies, not as an absolute jurisdictional bar. *See Mason & Dixon Tank Lines v. Central States, Southeast & Southwest Areas*

Pension Fund, 852 F.2d 156, 163 (6th Cir. 1988); *Robbins v. Admiral Merchants Motor Freight*, 846 F.2d 1054, 1056 (7th Cir. 1988); *Central States Southeast & Southwest Areas Pension Fund v. T.I.M.E.-DC*, 826 F.2d 320, 325-28 (5th Cir. 1987); *I.A.M. Nat. Pension Fund v. Clinton Engines*, 825 F.2d 415, 417 & n.4 (D.C. Cir. 1987).

"[A]rbitration reigns supreme under the MPPAA." *Id.* at 422. The MPPAA provides: "*Any* dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under [29 U.S.C. §§ 1381-1399] *shall* be resolved through arbitration." 29 U.S.C. § 1401(a)(1) (emphasis supplied). An employer's withdrawal liability first is determined by the plan sponsor, 29 U.S.C. §§ 1382, 1399(b)(1), whereupon the employer has ninety days to request a recalculation, 29 U.S.C. § 1399(b)(2). Once the employer has responded to this request, or upon the elapse of 120 days, the employer has sixty days to request arbitration. 29 U.S.C. § 1401(a)(1). Failure to initiate arbitration within this statutory period has a harsh result – the amount demanded by the pension plan sponsor becomes due and owing.

> If no arbitration proceeding has been initiated . . . the amounts demanded by the plan sponsor under [29 U.S.C. § 1399(b)(1)] shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State of Federal court of competent jurisdiction for collection.

29 U.S.C. § 1401(b)(1). By failing to arbitrate, an employer thus waives any defenses to collection actions that could properly have been heard before the arbitrator. *See In re Centric Corp.*, No. 89-1080, slip op. at 8-9 (10th Cir. Apr.

23, 1990); *McNicholas*, 848 F.2d at 23-24; *Clinton*, 825 F.2d at 429.

In enacting the MPPAA, Congress sought to channel disputes over withdrawal liability into the informal and expeditious procedure of arbitration. *Teamsters Pension Trust Fund v. Allyn Transp. Co.*, 832 F.2d 502, 504 (9th Cir. 1987). Thus, in addition to performing the technical function of calculating an employer's withdrawal liability, MPPAA arbitrators may determine whether an employer has completely withdrawn from a plan, *id.* at 506, resolve labor issues to the extent necessary to determine whether an employer has withdrawn, *see New York Teamsters Conference Pension & Retirement Fund v. McNicholas Transp.*, 848 F.2d 20, 23 (2d Cir. 1988), and engage in statutory interpretation of the MPPAA, *Allyn*, 832 F.2d at 506; *Flying Tiger Lines v. Teamster Pension Trust Fund of Philadelphia*, 830 F.2d 1241, 1247 (3d Cir. 1987). On the other hand, arbitration may be bypassed in cases involving constitutional questions, *Marvin Hayes Lines v. Central States, Southeast & Southwest Areas Pension Fund*, 814 F.2d 297, 300 (6th Cir. 1987); *Republic Indus. v. Teamsters Council No. 83 of Virginia Pension Fund*, 718 F.2d 628, 635 (4th Cir. 1983), questions of statutory interpretation outside the MPPAA, *Flying Tiger*, 830 F.2d at 1253-55, and allegations of fraud, *Carl Colteryahn Dairy Inc. v. Western Pa. Teamsters & Employers Pension Fund*, 847 F.2d 113, 118-19 (3d Cir. 1988). Moreover, because "a failure to arbitrate does not waive a defense that the employer does not yet have," an employer who fails to arbitrate may still assert a laches defense in a subsequent collection action. *Centric*, slip op. at 10. Under the MPPAA, the arbitrator's factual findings

are presumed correct, 29 U.S.C. § 1401(b); however, district courts review the arbitrator's legal conclusions *de novo. Trustees of Amalgamated Ins. Fund v. Geltman Indus.* 784 F.2d 926, 929 (9th Cir. 1986).

Howard does not dispute the Draconian result produced by an employer's failure to arbitrate. However, Howard contends that, because its withdrawal liability hinges upon labor law questions adjudicated before the NLRB, *i.e.*, the existance [sic] of an impasse, the arbitrator lacked jurisdiction to determine whether Howard had a duty to contribute to the fund. In advancing this argument, Howard has confused jurisdiction with preclusion. Under settled principles of preclusion, relitigation of issues adjudicated before the NLRB in a subsequent MPPAA action is barred by collateral estoppel, to the extent that the issues are identical and their resolution was essential to the NLRB's determination. *See United States v. Utah Constr. Co.*, 384 U.S. 394, 422 (1966); 4 K. Davis, *Administrative Law Treatise* § 21:3 at 51-52 (1983); *Restatement (Second) Judgments* § 83. Thus, in determining whether Howard had a continuing duty to contribute to the fund under 29 U.S.C. § 1392(a), both the arbitrator and the district court on review would be obligated to accord collateral estoppel effect to the NLRB's findings. Indeed, a MPPAA arbitrator may, in his discretion, elect to stay proceedings pending resolution of a prior NLRB action. Nevertheless, this preclusionary obligation does not divest arbitrators of jurisdiction over MPPAA claims involving labor law issues nor obviate the consequences of an employer's failure to arbitrate. Even if Howard would have prevailed in arbitration, by failing to take this statutorily required procedural step, Howard waived

its defenses to withdrawal liability. *See* 29 U.S.C. § 1401(b)(2). The trustees therefore are entitled to judgment as a matter of law. *See McNicholas*, 848 F.2d at 23-24; *Robbins*, 846 F.2d at 1057; *Allyn*, 832 F.2d at 506. We recognize the severity of this result and note the criticism to which § 1401 of the MPPAA has been subjected. *See, e.g.*, Woodrum & McBride, *Controlled Group Liability Under the Multiemployer Pension Plan Amendments Act: Liability Without a Limit*, 90 W. Va. L. Rev. 731, 735 (1988) ("a federal court collection action by a plan against an employer who has failed to navigate the shoals of arbitration is tantamount to obtaining a default judgment."); Comment, *MPPAA Withdrawal Liability Assessment: Letting the Fox Guard the Henhouse*, 14 Fordham Urb. L. J. 211, 236 (1986) (criticizing MPPAA arbitration procedure). Nevertheless, Congress deemed that this harsh remedy was appropriate when it enacted the MPPAA and we decline to second-guess its judgment here.

The district court shall enter judgment for the trustees.

REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES COURTHOUSE
DENVER, COLORADO 80294

ROBERT L. HOECKER May 22, 1990
CLERK

(Filed May 24, 1990)

To: ALL RECIPIENTS OF THE CAPTIONED OPINION

Re: No. 88-2938; Trustees of Colorado Pipe Industry Pension Trust v. Howard Electrical

Published opinion filed on May 18, 1990 by Honorable Bobby R. Baldock, United States Circuit Judge.

Please make the following corrections in the opinion of this court filed on May 18, 1990:

Page 4, line 2: Change "December 1984" to December 1983"

Page 7, line 15: Change "errant employees" to "errant employers"

Very truly yours,

ROBERT L. HOECKER,
CLERK

By /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 86-M-2561

TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST, et al.,

Plaintiff,

v.

HOWARD ELECTRICAL & MECHANICAL, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

In the first claim for relief in the amended complaint, filed June 25, 1987, the plaintiffs sought collection of claimed delinquent contributions to their several fringe benefit funds under the Employee Retirement Income and Security Act of 1974 (ERISA), 29 U.S.C. § 1001, et seq. The parties entered into a stipulated pre-trial order on April 18, 1988, including fact stipulations. The defendant Howard Electrical & Mechanical, Inc., is an employer within the meaning of Section 501(1) of the Labor Management Relations Act of 1947, 29 U.S.C. § 142(1). It was signatory to collective bargaining agreements with Plumbers Local No. 3 and Pipefitters Local No. 208, which required payment to the plaintiffs as multi-employer plans within the meaning of ERISA. Those contracts expired by their terms on May 31, 1983. Efforts to negotiate new agreements failed and the employer and unions reached an impasse on December 31, 1983, at which time Howard implemented its impasse offer. Under that offer,

Howard made vacation, insurance and pension contributions to the plans for journeyman plumbers and pipefitters in its employ through December 31, 1984. On that day, the three workmen who were covered by the December 31, 1983 impasse offer left their employment with Howard and Howard then made no further payments to the plaintiffs, except for tendered contributions which plaintiffs rejected in 1987. Howard continued to perform work in the jurisdiction for which contributions were required under the terms of the expired collective bargaining agreements.

The plaintiffs concede that this first claim for relief for delinquent contributions must be dismissed because the claims do not arise out of any contractual obligation and the Supreme Court held in *Laborers Health and Welfare Trust Fund for Northern California, et al. v. Advanced Lightweight Concrete Co., Inc.*, ___ U.S. ___, 56 U.S.L.W. 4156 (Feb. 23, 1988) that the remedy provided by 29 U.S.C. § 1145 and § 1132(g)(2) is limited to the promised contributions under a collective bargaining agreement and not to any statutory obligation after the termination of that contract. The premise of the holding was that the statutory obligation, if any, arose under the employer's obligation to bargain in good faith and that any violation of § 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5), was a matter within the exclusive jurisdiction of the National Labor Relations Board (NLRB).

The plaintiffs' second claim for relief is for withdrawal liability under the Multi-employer Pension Plan Amendments of 1980 (MPPA), 29 U.S.C. § 1381, et seq. More particularly, the plaintiffs claim that Howard had withdrawn, effective December 31, 1984, and under 29

U.S.C. § 1381, the Plans assessed Howard the amount of $555,852.00 in withdrawal liability. Notice of withdrawal was given on May 29, 1986. Howard made no withdrawal liability payments and made no requests to arbitrate the assessment of withdrawal liability as provided for in 29 U.S.C. § 1401(a). Accordingly, the plaintiffs assert that this court has jurisdiction for the collection of the withdrawal payments under 29 U.S.C. § 1401(b). The defendants assert that there is no jurisdiction because the question of any withdrawal liability is subsumed within unfair labor practice charges which the unions brought before the NLRB and which are the subject of ongoing proceedings before that agency.

The plaintiffs contend that Howard had no obligation to make benefit contributions under its impasse offers except for those journeyman in its employ on December 31, 1983, and that obligation ended with the termination of their employment on December 31, 1984. That termination is said to be the triggering event for the determination of withdrawal liability. 29 U.S.C. § 1383 provides that a withdrawal occurs when an employer permanently ceases to have an obligation to contribute. Thus, it is argued that the termination of the employment of these journeyman and the stopping of contributions on their behalf ended this employer's obligation to participate in the plans. Plaintiffs contend that the failure of Howard to seek arbitration of the dispute precludes any defense in this court and therefore summary judgment is appropriate on the second claim for relief.

This case presents the difficulty of construing two statutory schemes regulatory employment. ERISA, as

amended by MPPA, reflects an extensive effort by Congress to protect the integrity and financial stability of private pension and welfare plans in the national public interest. MPPA was enacted for the particular protection of multi-employer plans and the withdrawal liability is a statutory obligation to protect the remaining contributors after an employer withdraws. Such liability was not before the Supreme Court in the *Advanced Lightweight Concrete* case. But, as the Court noted, the obligation to contribute under the plan includes both the employer's contractual obligation and any obligation imposed by the NLRA. Here, the imposition of withdrawal liability by the plaintiffs was directly related to the negotiating history of the dispute between the unions and the employer. The unfair labor practice charges brought by the unions directly relate to, and indeed control, the question of whether there was a permanent underlying termination of an obligation to contribute under the plans within the meaning of 29 U.S.C. § 1383. It is this court's conclusion that the enactment of the requirement for arbitration in Section 1401(a) was not intended to supersede or supplant the authority of the NLRB under the NLRA and that the unfair labor practice charges brought by the unions and still pending before the NLRB are matters for which the NLRB had exclusive jurisdiction and preclude this court from proceeding in this matter. Accordingly, it is

ORDERED that the defendants' motion for summary judgment is granted and this civil action is dismissed for lack of jurisdiction.

Dated: *November 28, 1988*

BY THE COURT:

/s/ Richard P. Matsch
Richard P. Matsch, Judge

UNITED STATES DISTRICT COURT

___ DISTRICT OF COLORADO

TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST, et al.,

Plaintiffs,

v.

HOWARD ELECTRICAL & MECHANICAL, INC.,

Defendant.

JUDGMENT IN A CIVIL CASE

CASE NUMBER 86-M-2561

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered. Pursuant to memorandum opinion and order entered by Judge Richard P. Matsch on November 28, 1988,

IT IS ORDERED AND ADJUDGED

that the defendants' motion for summary judgment is granted and this civil action is dismissed for lack of jurisdiction.

November 28, 1988
Date

JAMES R. MANSPEAKER
Clerk

/s/ Jacob Gilmore
(By) Deputy Clerk

Case Number: 86-M-2561

I certify that I mailed a copy of the attached to the following:

Dated: 11-28-88

JAMES R. MANSPEAKER, CLERK

By: /s/ Jacob Gilmore
Jacob Gilmore, Deputy Clerk
Terri A. Smethers, Secretary

James C. Fattor
1600 Broadway, Ste. 1900
Denver, CO 80202

Earl K. Madsen
1717 Washington Ave.
Golden, CO 80401

293 NLRB No. 51

SJC
D – 9476
Denver, CO

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

HOWARD ELECTRICAL AND MECHANICAL, INC.	Cases 27 – CA – 8889 27 – CA – 8889 – 2
and	
PLUMBERS LOCAL UNION NO. 3, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA	Case 27 – CA – 8924
PIPEFITTERS LOCAL UNION NO. 208, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA	

DECISION AND ORDER
(Filed April 3, 1989)

On April 8, 1987, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The General Counsel filed exceptions and a supporting brief. The

Respondents filed exceptions, a supporting brief, and an answering brief to the General Counsel's exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

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[1] The Respondent filed a motion for leave to supplement the record evidence, requesting that two letters from the Charging Parties to the Respondent dated November 12 and 13, 1986, be added to the record. The Charging Parties opposed the motion because the documents in question were already a part of the record as Jt. Exhs. 37(a) and (b). On examination of the record, we find the Charging Parties' observation to be correct and deny the Respondent's motion.

[2] The Respondent excepts to the judge's findings that the Regional Director properly set aside the informal Board settlement agreements resolving these cases. After careful review of the judge's decision, we adopt these findings because we agree that there was no meeting of the minds by the parties insofar as the settlements affected the Respondent's right to employ plumbers and pipefitters as "pre-apprentices." In this regard, we observe that the judge found that when the Respondent read the language of the settlements it could have reasonably believed the parties meant the Respondent was obligated to apply the December 1983 proposals to those individuals claimed as pre-apprentices. No exception to this finding was filed.

Member Cracraft agrees that the Regional Director was warranted in setting aside the October 17, 1984 settlement agreements, but for reasons other than those stated by the judge and adopted by her colleagues. She would find instead

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The second amended complaint is based on charges filed by Plumbers Local Union No. 3 (the Plumbers) on

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that the Respondent breached the settlement agreements when it classified new hires as pre-apprentices and unilaterally established their rates of pay and ceased to contribute to employee benefit funds established in the 1981-1983 contract on their behalf. The settlement agreements stated that all employees would be reimbursed for differences in wage rates. The agreement with Local 3 cited Al Farrell as an employee who, along with other similarly situated employees, should be made whole. Farrell was hired on June 27, 1984, as a pre-apprentice and paid $12 per hour with no contribution to employee benefit funds. Unless the settlement required the parties to return to the 1981 – 1983 contract conditions rather than, as the Respondent contends, to the conditions set forth in the Respondent's December 1983 proposals, the requirement of backpay for Farrell and those similarly situated is meaningless. Thus, Member Cracraft would find that the settlement agreements prohibited the Respondent from classifying new hires as pre-apprentices, unilaterally establishing their rates of pay, and failing to contribute to employee benefit funds on their behalf, when it took such actions. For that reason, Member Cracraft would set aside the settlement agreements. Although, as noted by her colleagues, no specific exception was taken to the judge's finding that the Respondent could have reasonably believed the language of the settlement agreements meant that it was obligated to apply the December 1983 proposals to pre-apprentices, Member Cracraft notes that the Respondent specifically excepted to the judge's findings that the settlement agreements should be set aside and that there was no meeting of the minds regarding the settlement agreements at the time of their execution. In her view, these exceptions squarely place the issue of the parties' intent when the settlement agreements were entered into before the Board.

The complaint alleges that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally changing the unit employees'

(Continued on following page)

July 23 and August 28, 1984, and a charge filed by Pipefitters Local Union No. 208 (the Pipefitters) on August 22, 1984, later amended on August 25, 1984. According to the allegations in the second amended complaint, during the bargaining sessions with the Unions held in late December 1983, the Respondent insisted on proposals that were a nonmandatory subject of bargaining because they constituted an attempt to alter the scope of the existing contractual units by excluding plumbers and pipefitters classified as pre-apprentices. The second amended complaint alleges further that, inter alia, the Respondent violated Section 8(a)(5) and (1) of the Act when it implemented its December contract proposals on or after January 23, 1984, in the Plumbers unit and on or after

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benefits when it implemented its August 15, 1984 proposal without affording the Unions an opportunity to bargain about the matter. The judge dismissed this allegation because there was insufficient evidence to establish that the Respondent, in fact, had implemented its August proposal. The General Counsel excepts to this dismissal. In agreeing with the judge, we note that the General Counsel does not dispute that the evidence did not show actual implementation, but, rather, she incorrectly relies on the Respondent's announced intent to implement the proposal as establishing the unilateral implementation. See *Swift Independent Corp.*, 289 NLRB No. 51, fn. 11 (June 29, 1988) (limitations period commenced at closing of plant rather than at time of the announcement of the closing). Cf. *Ciba-Geigy Pharmaceuticals*, 264 NLRB 1013, 1018 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983) (announcement of new working conditions to *employees* constitutes implementation of policy).

The judge dismissed the 8(a)(5) complaint allegation pertaining to the Respondent's bargaining conduct in July 1985. In the absence of exceptions, we adopt this dismissal.

February 22, 1984, in the Pipefitters unit in the absence of a valid, good-faith bargaining impasse. According to the General Counsel, because the Unions never agreed to exclude the pre-apprentices and Board proceedings were never initiated to change the contractual units, the Respondent could not treat the pre-apprentices as non-unit employees, assign them unit work, and fail to apply unit wages and employment terms to employees in the unilaterally established pre-apprentice classification. The second amended complaint further alleges that the Respondent violated Section 8(a)(5) and (1) of the Act when it implemented its June 1984 contract proposals in both units on July 1, 1984. With respect to this allegation, the General Counsel contends, inter alia, that the Unions were not afforded an opportunity to bargain over the June proposals before their implementation.

The judge dismissed the allegations pertaining to the December proposals on the ground that, under *Machinists Local 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411 (1960),[3]

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[3] In *Bryan*, supra, the parties executed a collective-bargaining agreement in August 1954. The agreement contained a recognition provision and a union-security provision. At the time of execution, the union did not represent a majority of the employer's employees. In June and August 1955, 10 and 12 months later, charges were filed alleging that the maintenance and enforcement of the agreement violated the Act. The Court concluded that Sec. 10(b) barred the allegations. More precisely, the Court held that these charges were untimely because the conduct occurring within the limitations period could be an unfair labor practice only through reliance on an earlier unfair labor practice that was itself time-barred because it was based entirely on events occurring outside the 10(b) period.

these allegations were barred by the limitations period in Section 10(b) of the Act.[4] He concluded that they were based on pre-10(b) conduct that would constitute an unfair labor practice. The judge also dismissed the allegations pertaining to the June proposals because he found that, prior to implementation, the Unions had merely rejected these proposals in their entirety and had not specifically opposed the Respondent's interjection of the alleged nonmandatory issues. Given this context, the judge found that the June proposals were implemented after the Respondent had bargained with the Unions to a valid impasse. For the reasons set forth below, we reverse the judge and find, based on the stipulated record, that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing its December and June proposals.

The Respondent is engaged in the building and construction industry as an electrical and mechanical contractor in the Denver, Colorado area. In separate bargaining units, the Plumbers and the Pipefitters represent the journeymen and apprentice plumbers, gas fitters, pipefitters, and various foremen employed by the Respondent.[5] The Unions' most

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[4] Sec. 10(b) of the Act provides, in pertinent part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board."

[5] The parties stipulated that, at all times material, the Unions have been and are the exclusive representatives of their respective units under Sec. 9(a) of the Act. Although this stipulation was entered into prior to the issuance of our decision in *John Deklewa & Sons*, 282 NLRB No. 184 (Feb. 20, 1987), and therefore may simply have reflected the Respondent's concession that it would be deemed to have a 9(a) relationship

(Continued on following page)

recent collective-bargaining agreements with the Respondent expired on May 31, 1983.

The Respondent and the Unions began separate, but parallel, negotiations for successor agreements in 1983. Prior to December 1983, the Respondent met with the Plumbers on March 23, April 27, May 19 and 31, and July 6 and with the Pipefitters on March 22, April 15 and 27, May 19, June 1 and 28, July 20, September 16, and November 17.

As reflected by the minutes for the pre-December bargaining sessions, the Respondent offered the Unions several proposals on different subjects, including proposals changing the contractual recognition clauses. Both contractual recognition clauses included the following classifications: journeyman plumbers and gas fitters, apprentice plumbers and gas fitters, area plumber foremen, general plumber foremen, plumber foremen, journeymen pipefitters, apprentice pipefitters, area pipefitter foremen, general pipefitter foremen, and pipefitter foremen. The Pipefitters contractual recognition clause also included the classification of "provisional apprentices."

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under the issuance of *Deklewa*, we nonetheless reject the Respondent's attempt to rely on *Deklewa* here because it is untimely. This claim was not raised to the judge, whose decision was issued more than a month after the decision in *Deklewa*, nor was it raised in the Respondent's exceptions to the Board filed on May 26, 1987. For the purposes of this case, the Respondent and the Unions have a 9(a) bargaining relationship. Member Johansen agrees that the reason for the stipulation is irrelevant and that the attempt to raise the nature of the bargaining relationship is untimely.

At the pre-December bargaining sessions with the Plumbers, the Respondent proposed that the Plumbers unit be described in the successor contract as

> all full time and regular part-time employees employed by the Employer performing plumbing work in the plumbing industry within the jurisdiction of Local 3 as it exists at the time of the execution of this agreement.

At the pre-December bargaining sessions held with the Pipefitters, the Respondent similarly proposed that the Pipefitters unit be described in the successor contract as

> all full time and regular part-time employees employed by the Employer performing pipe fitting work in the pipe fitting industry within the jurisdiction of Local Union 208 as it exists at the time of execution of this agreement.

These minutes reveal in general terms that the Respondent's recognition clause proposals were reviewed and discussed with both Unions during the pre-December bargaining sessions. At the July 6 bargaining session, the Plumbers, through a letter from its attorney, objected to the Respondent's proposed unit modification. The Plumbers' objection was that temporary part-time employees and any additional future jurisdictional territory of the Union were excluded by the Respondent's proposal. With respect to the Pipefitters negotiations, the record does not disclose what the discussions were concerning the Respondent's proposed unit modification.

At the bargaining sessions held on December 29, 1983, with the Plumbers and on December 30, 1983, with the Pipefitters, the Respondent submitted several new

proposals. The Respondent proposed, inter alia, that certain plumbers and pipefitters be classified as pre-apprentices and be excluded from both units.[6] The Respondent's proposals defined "pre-apprentices" as employees who "shall be primarily used for performing work which does not require all the skills of a journeyman" and "may be assigned to perform work for which they are qualified, under the direction of a journeyman." The Respondent also proposed the exclusion of pre-apprentices from the coverage of the union-security and hiring hall provisions of the contracts; a minimum hourly wage rate for pre-apprentices lower than what it proposed for unit employees; and no contract fringe benefits, except profit-sharing participation and major medical insurance plan coverage, for pre-apprentices.

The Respondent characterized its December proposals as a "final" or "last" offer. At the December 29

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[6] In this connection, the Respondent proposed that it recognize the Plumbers as the sole and exclusive bargaining representative for and on behalf of all full time and regular part-time employees and temporary part-time employees except pre-apprentices and supervisors employed by the Employer performing plumbing work in the plumbing industry within the jurisdiction of Local Union 3 as it exists at the time of execution of this agreement.

The Respondent proposed that it recognize the Pipefitters as the sole and exclusive bargaining representative for and on behalf of all full time, regular part-time employees and temporary part-time employees except pre-apprentices and supervisors employed by the Employer performing pipe fitting work in the pipe fitting industry.

bargaining session with the Plumbers, the Respondent said that it "intended to implement its final offer effective January 1, 1984." At the December 30 session, the Pipefitters said that the Respondent's offer would be submitted to the Union's membership. The record does not otherwise disclose what transpired at these bargaining sessions.[7] Shortly thereafter, the Respondent's December proposals for both Unions were rejected.

The Respondent and the Pipefitters continued their negotiations in January 1984. On January 11, 1984, the Pipefitters requested further negotiations. On January 16, 1984, the Respondent agreed to meet if the Pipefitters submitted a written proposal "substantially better" than the last proposal on the table. On January 20, 1984, the Pipefitters submitted a written contract proposal, which did not include the Respondent's December pre-apprentice proposals. In its letter of January 26, 1984, the Respondent rejected the Pipefitter's counteroffer, claiming that it did not contain a single concession and included numerous changes. The Respondent stated that in these circumstances there was no reason to resume negotiations with the Pipefitters. The Respondent also asserted that impasse existed and it would implement its last offer. The Respondent did not specify when implementation would occur.

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[7] The record does not demonstrate whether, or to what extent any of the Respondent's December proposals were discussed or considered by the Respondent and the Unions at those meetings. Minutes for the December 29 and 30 bargaining sessions were not made a part of the stipulated record.

Without using the Unions' hiring halls, the Respondent hired its first pre-apprentice plumber on May 17, 1984, and its first pre-apprentice pipefitter on April 30, 1984. During their employment, both pre-apprentices were assigned unit work, but were treated as nonunit employees and did not receive unit wages or all the unit fringe benefits.[8]

The next communication with either Union was the Respondent's contract proposals of June 19, 1984. The Respondent's June proposals differed from its December 1983 proposals in that, inter alia, the June proposals excluded apprentices from the bargaining unit and the hiring hall contractual requirement, omitted the union-security clause for all unit employees, and eliminated the Respondent's obligation to contribute to the apprentice and journeymen training fund for all unit employees.[9] The Respondent informed the Unions that its June proposals "must be accepted in total, prior to July 1, 1984."

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[8] Thereafter, the Respondent hired other plumbers and pipefitters who were classified as pre-apprentices and were similarly treated as nonunit employees.

[9] In particular, the June proposals included a clause recognizing each Union as "the sole and exclusive bargaining representative for and on behalf of all full time, regular part-time employees and temporary part-time employees except apprentices, pre-apprentices and supervisors, employed by the Employer" and "performing plumbing work at the jobsite in the plumbing industry" for the Plumbers unit and "performing pipe fitting work at the jobsite in the pipe fitting industry" for the Pipefitters unit.

On June 27, 1984, the Plumbers notified the Respondent that it had rejected the June proposals, but offered to meet in the future to discuss a contract. The Plumbers' request was not honored and negotiations on the June proposals were not held. On July 3, 1984, the Pipefitters notified the Respondent that it had rejected the June proposals and indicated that it was willing to continue negotiations. After receiving the Unions' notices, the Respondent thereafter implemented the June proposals for both units.

With regard to the implementation of the Respondent's December and June proposals, the judge determined that the limitations period for the unilateral changes occurring on April 30 and May 17, 1984, was triggered not by their implementation dates, but by the Respondent's earlier announced intent to implement its December proposals and by a purported "unprivileged and invalid" impasse reached on December 29 and 30, 1983. The judge additionally based his conclusion that the complaint was time-barred on his interpretation of the complaint allegations as requiring a finding that the impasse that occurred in December, outside the 10(b) period, was unlawful. The judge thus concluded that the finding of a violation would run afoul of the dictates of *Bryan*, supra. We find that the judge's analysis rests on at least two erroneous premises.

First, the judge erroneously assumed that a determination of whether a valid impasse occurred is essential to a determination of whether implementation of the Respondent's December proposals violated the Act. As we explain below, however, when a party unilaterally changes the scope of the unit, it is irrelevant whether

impasse has been reached. The only question is whether the other party has consented to the change. Thus, we need not scrutinize the December events for evidence of impasse to determine that the Respondent violated the Act when it unilaterally implemented the proposals in April and May.

Second, the judge erroneously dated the actual implementation from the Respondent's announcement of an intent to implement. Notice of an intent to commit an unlawful unilateral implementation, however, does not trigger the 10(b) period with respect to the unlawful act itself. *American Distributing Co. v. NLRB*, 715 F.2d 446, 452 (9th Cir. 1983), enfg. 264 NLRB 1413 (1982).[10] The judge acknowledged that the first indication that the Respondent was implementing terms of its December proposals came when the Respondent began the hiring of preapprentices in April and May. In fact, had other terms

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[10] Thus, even if the existence of a prior valid impasse were relevant to a determination of the unilateral implementation violation involved here, the 10(b) period for the implementation allegation would start running at the time the unilateral changes were implemented rather than from the date of the alleged impasse.

Of course, it is arguable that the Respondent violated Sec. 8(a)(5) in January 1984 when it refused to engage in further bargaining with the Pipefitters unless the latter consented to changes in unit scope. But that violation (conditioning further bargaining on concessions as to nonmandatory subjects) would be entirely independent of the later implementation, which, as we find below, was unlawful because it was done without the Unions' consent. Notice of one type of violation would not start the 10(b) period running as to the other.

which the Respondent proposed in December been implemented, such as the manner in which benefit contributions were made, the Unions might have been on notice that the implementation had occurred. Accordingly, we find that the actionable, alleged unfair labor practice occurred here when the pre-apprentice proposals were implemented in April and May and that the 10(b) period did not start running until that time.[11]

Accordingly, we turn our attention to the merits of the case.[12] With its pre-apprentice proposals, the Respondent was, in effect, attempting to gain the Unions' permission to create a new classification of workers who

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[11] See *American Distributing Co.*, supra; *Swift Independent Corp.*, supra, 289 NLRB No. 51 at fn. 11; and *Teamsters Local 42 (Daly Co.) v. NLRB*, 825 F.2d 608, 615 (1st Cir. 1987). The Respondent relies, inter alia, on *Postal Service Marina Center*, 271 NLRB 397 (1984). We note, however, that in that case, which involved a discriminatory discharge, the Board expressly stated that it was not considering what implication, if any, the holding there would have in other contexts. Id. at 401.

[12] The General Counsel, by raising the question of whether a valid impasse existed here, seemingly implies that the Respondent would have escaped liability by the existence of a valid impasse. Although the record does not demonstrate either that the parties were deadlocked on the pre-apprentice proposals, which modified the existing units, or that the Respondent had insisted on these proposals (a subject the Unions were not required to bargain about) as a precondition to reaching successor contracts, a focus on impasse is misplaced here. Given the character of the pre-apprentice proposals, the Respondent would not escape liability by the existence of an impasse. Rather, as found infra, the Respondent violated the Act because it implemented its unit scope proposals without the consent of the Unions.

would perform traditional bargaining unit work, but would be specifically excluded from the unit. While the record does not indicate the substance or length of the parties' December discussions concerning the pre-apprentice concept, it is undisputed that the Unions did not agree to this concept.

The Plumbers, aside from rejecting the pre-apprentice proposals as part of a final offer package after the December sessions, took the position that, starting with the July 6, 1983 session, it wanted to continue to represent all employees performing plumbing work for the Respondent. Similarly, the Pipefitters' counteroffer of January 1984 does not indicate that it is final and also suggests that the Pipefitters did not want the pre-apprentice proposals. The Pipefitters' counteroffer, submitted at a time when the Respondent was looking for a "substantially better" offer from that Union, did not include the Respondent's pre-apprentice proposals. As noted above, the crucial question in the case is whether the Unions consented to the proposed changes in the scope of the unit, changes over which, because of their nonmandatory nature, the Unions were not even required to bargain. In these circumstances, we find that the Respondent unlawfully implemented its December pre-apprentice proposals because they concerned subjects which the Unions were not required to bargain about and the implementation was done without the consent of the Unions.[13]

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[13] See, e.g., *Boise Cascade Corp.*, 283 NLRB No. 69 (Mar. 31, 1987), enfd. 860 F.2d 471 (D.C. Cir. 1988).

We also reverse the judge's findings with respect to the complaint allegations relating to the implementation of the Respondent's June package proposals. On receipt of the June proposals, which differed from the Respondent's December package proposals, the Unions notified the Respondent that they were willing to continue negotiations. The Respondent ignored the Unions' requests and declared an impasse prior to any further negotiations. This demonstrates that the Respondent had a fixed determination to implement its June package proposals regardless of the status of its negotiations with the Unions and without the Unions' consent. Accordingly, we find that the implementation of the Respondent's June package proposals violated Section 8(a)(5) and (1). See *Excavation-Construction, Inc.*, 248 NLRB 649 (1980).

Conclusions of Law

1. By refusing to bargain in good faith with Plumbers Local Union No. 3 and Pipefitters Local Union No. 208 as the exclusive bargaining representatives of the employees in the contractual bargaining units when it unilaterally implemented its December 1983 and June 1984 contract proposals, thereby changing the wages, benefits, and other terms and conditions of employment for bargaining unit employees, the Respondent violated Section 8(a)(5) and (1) of the Act.

2. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in and is engaging in certain unfair labor practices, we shall order that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

Specifically, we shall order that, on request, the Respondent bargain with the Unions and, if an understanding is reached, to embody the understanding in a signed agreement. We shall also order that, on request, the Respondent restore the status quo and rescind the unilateral changes made in the respective units commencing April 30 and May 17, 1984, and make all affected employees whole for losses they incurred by virtue of its unilateral changes from April 30 and May 17, 1984, until it negotiates in good faith with the Unions to agreement or to a valid impasse. If the unions elect to have previous conditions restored, calculations of the sums and payments necessary to make employees whole, with interest, shall be computed in accordance with normal Board policy. See *Ogle Protection Service*, 183 NLRB 682 (1970); *New Horizons for the Retarded*,[14] 283 NLRB No. 181 (May 28, 1987); *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

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[14] Interest on or after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

ORDER

The National Labor Relations Board orders that the Respondent, Howard Electrical and Mechanical, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Plumbers Local Union No. 3 and Pipefitters Local Union No. 208 as the exclusive bargaining representatives of the employees in the bargaining units described below as Unit A and Unit B by unilaterally implementing its December 1983 and June 1984 contract proposals that changed the wages, benefits, and other terms and conditions of employment for bargaining unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with Plumbers Local Union No. 3 as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Unit A

All journeymen plumbers and gas fitters, apprentice plumbers and area fitters, area plumber foremen, general plumber foremen, plumber

foremen, journeymen pipefitters, apprentice pipefitters, area pipefitter foremen, general pipefitter foremen, and pipefitter foremen who are employed by the Respondent, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

(b) On request, bargain with Pipefitters Local Union No. 208 as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Unit B

All journeymen plumbers and gas fitters, apprentice plumbers and gas fitters, area plumber foremen, general plumber foremen, plumber foremen, journeymen pipefitters, apprentice pipefitters, area pipefitter foremen, general pipefitter foremen, pipefitter foremen, and provisional apprentices employed by the Respondent, excluding all other employees, office clerical employees, guards and supervisors as defined by the Act.

(c) On request of the Unions, rescind the unilateral changes in the unit employees' wages, benefits, and other terms and conditions of employment that were made commencing April 30, 1984, in Unit B and May 17, 1984, in Unit A and make all those employees whole, with interest, for losses they incurred by virtue of its unilateral changes to their wages, benefits, and other terms and conditions of employment from April 30 and May 17, 1984, respectively, until it negotiates in good faith with

the Unions to agreement or to a valid impasse in the manner set forth in the remedy section of this decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Denver, Colorado office copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. March 29, 1989

James M. Stephens,
Chairman

Wilford W. Johansen,
Member

Mary Miller Cracraft,
Member

NATIONAL LABOR RELATIONS
BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with Plumbers Local Union No. 3 and Pipefitters Local Union No. 208 as the exclusive bargaining representatives of the employees in the bargaining units described below as Unit A and Unit B, respectively, by unilaterally implementing our December 1983 and June 1984 contract proposals, that changed the wages, benefits, and other terms

and conditions of employment for bargaining unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with Plumbers Local Union No. 3 as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Unit A

All journeymen plumbers and gas fitters, apprentice plumbers and gas fitters, area plumber foremen, general plumber foremen, plumber foremen, journeymen pipefitters, apprentice pipefitters, area pipefitter foremen, general pipefitter foremen, and pipefitter foremen who are employed by the Employer, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL, on request, bargain with Pipefitters Local Union No. 208 as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Unit B

All journeymen plumbers and gas fitters, apprentice plumbers and gas fitters, area plumber foremen, general plumber foremen, plumber foremen, journeymen pipefitters, apprentice pipefitters, area pipefitter foremen, general

pipefitter foremen, pipefitter foremen, and provisional apprentices employed by the Employer, excluding all other employees, office clerical employees, guards and supervisors as defined by the Act.

WE WILL, on request of the Unions, rescind the unilateral changes in the unit employees' wages, benefits, and other terms and conditions of employment that were made on or after April 30, 1984, in Unit B and May 17, 1984, in Unit A and WE WILL make all those employees whole, with interest, for losses they incurred by virtue of our unilateral changes to their wages, benefits, and other terms and conditions of employment from April 30 and May 17, 1984, respectively, until we negotiate in good faith with the Unions to agreement or to a valid impasse.

HOWARD ELECTRICAL
AND MECHANICAL, INC.

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 600 17th Street, Third Floor, South Tower, Denver, Colorado 80202-5433, Telephone 303-844-3554.

JD(SF)–39–87
Denver, Colo.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

HOWARD ELECTRICAL AND MECHANICAL, INC.

and

Cases
27–CA–8889
27–CA–8889-2
27–CA–8924

PLUMBERS LOCAL UNION NO. 3, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

and

PIPEFITTERS LOCAL UNION NO. 208, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

Barbara E. Young, for the General Counsel. *Hornbein, MacDonald & Fattor* by *James C. Fattor*, for the Charging Parties.
Kapland, Jacobowitz, Byrnes, Rosier & Hendricks, by *James P. Hendricks*, for the Respondent.

DECISION

Statement of the Case

JERROLD H. SHAPIRO, Administrative Law Judge: This proceeding, in which a hearing was held January 21, 1987, is based upon the following: Charges filed in Cases 27–CA–8889 and 27–CA–8889-2 by Plumbers Local Union No. 3 against Howard Electrical and Mechanical, Inc. (Respondent) on July 23, 1984 and August 28, 1984 respectively; A charge filed in Case 27-CA-8924 and an amended charge filed in that case by Pipefitters Local Union No. 208 against Respondent on August 22, 1984 and August 25, 1984 respectively; A second amended complaint issued in these cases November 26, 1986 on behalf of the General Counsel of the National Labor Relations Board (Board), by the Board's Regional Director, Region 27, alleging Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act (Act); The Regional Director's November 26, 1986 Order setting aside and vacating the settlement agreements entered into in these cases by the parties which had been approved on October 17, 1984 by the Regional Director; and, Respondent's answer to the second amended complaint denying the commission of the alleged unfair labor practices.[1]

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[1] In its answer Respondent admits it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and meets the Board's applicable discretionary jurisdictional standard. Also in its answer Respondent admits that the Charging Parties, Plumbers Local Union No. 3 and Pipefitters Local Union No. 208, each are labor organizations within the meaning of Section 2(5) of the Act.

Upon the entire record[2] and having considered the parties' posthearing briefs,[3] I make the following:

Findings of Fact

I. The Alleged Unfair Labor Practices

A. *The Facts*

1. The setting

Respondent, a corporation with its principal office and place of business in Denver, Colorado, is an electrical and mechanical contractor in the building and construction industry. The Charging Parties, Plumbers Local Union No. 3, (Local 3) and Pipefitters Local Union No. 208 (Local 208), who are affiliated with the United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, represent separate appropriate bargaining units of Respondent's employees. Local 3 at all times material has been and is the exclusive collective bargaining representative of the following appropriate unit of Respondent's employees:

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[2] The record consists of the formal papers, the parties' stipulation of facts as amended at the hearing, the parties' supplemental joint stipulation of facts, the parties' oral arguments, and their post hearing briefs.

[3] Respondent's Motion to Strike certain parts of the briefs filed by the General Counsel and the Charging Parties on the ground that they raise legal issues "outside the scope of the issues they indicated were in question during the on-the-record colloquy with the Administrative Law Judge," is denied. I have considered all of the arguments raised by the parties which are encompassed by the allegations of the second amended complaint.

> All journeymen, plumbers and gas fitters, apprentice plumbers and gas fitters, area plumber foremen, general plumber foremen, plumber foremen, journeymen pipefitters, apprentice pipefitters, area pipefitter foremen, general pipefitter foremen, and pipe fitting foremen who are employed by the Employer, excluding all other employees, office clerical employees, guards and supervisors as defined by the Act.

Local 208 at all times material has been and is the exclusive collective bargaining representative of the following appropriate unit of Respondent's employees:

> All journeymen plumbers and gas fitters, apprentice plumbers and gas fitters, area plumber foremen, general plumber foremen, plumber foremen, journeymen pipefitters, apprentice pipefitters, area pipefitter foremen, general pipefitter foremen, pipefitter foremen, and provisional apprentices employed by the Employer, excluding all other employees, office clerical employees, guards and supervisors as defined by the Act.

The Charging Parties and Respondent have been parties to a series of successive collective bargaining contracts. The most recent was effective May 1, 1981 through May 31, 1983, herein called the 1981-1983 contract. This contract is between the Charging Parties and the Contract Administration Fund of Northeastern Colorado, herein called the Association, on behalf of those employees including Respondent for whom the Association was authorized to bargain. The recognition clause in the 1981-1983 contract reads as follows:

> The Employers recognize the Unions as the sole and exclusive bargaining representatives, as certified by the National Labor Relations Board, Cases No. 30-RC-701 dated July 30, 1952 and

(III) This clause shall not apply in the case of any withdrawal described in subparagraph (D).

(IV) If under a plan this clause applies to any plan year but does not apply to the next plan year, this clause shall not apply to any plan year after such next plan year.

(V) For purposes of this clause, the term "required contributions" means, for any period, the amounts which the employer was obligated to contribute for such period (not taking into account any delinquent contribution for any other period).

(iii) A plan may be amended to provide that for the first plan year ending on or after September 26, 1980, the number "5" shall be substituted for the number "10" each place it appears in clause (i) or clause (ii) (whichever is appropriate). If the plan is so amended, the number "5" shall be increased by one for each succeeding plan year until the number "10" is reached.

(D) In any case in which a multiemployer plan terminates by the withdrawal of every employer from the plan, or in which substantially all the employers withdraw from a plan pursuant to an agreement or arrangement to withdraw from the plan –

(i) the liability of each such employer who has withdrawn shall be determined (or redetermined) under this paragraph without regard to subparagraph (B), and

(ii) notwithstanding any other provision of this part, the total unfunded

vested benefits of the plan shall be fully allocated among all such employers in a manner not inconsistent with regulations which shall be prescribed by the corporation.

Withdrawal by an employer from a plan, during a period of 3 consecutive plan years within which substantially all the employers who have an obligation to contribute under the plan withdraw, shall be presumed to be a withdrawal pursuant to an agreement or arrangement, unless the employer proves otherwise by a preponderance of the evidence.

(E) In the case of a partial withdrawal described in section 4205(a) [29 USCS § 1385(a)], the amount of each annual payment shall be the product of –

(i) the amount determined under subparagraph (C) (determined without regard to this subparagraph), multiplied by

(ii) the fraction determined under section 4206(a)(2) [29 USCS § 1386(a)(2)].

(2) Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

(3) Each annual payment determined under paragraph (1)(C) shall be payable in 4 equal installments due quarterly, or at other intervals specified by plan rules. If a payment is not made when due, interest on the payment shall accrue from the due date until the date on which the payment is made.

(4) The employer shall be entitled to prepay the outstanding amount of the unpaid annual withdrawal liability payments determined under paragraph (1)(C), plus accrued interest, if any, in whole or in part, without penalty. If the prepayment is made pursuant to a withdrawal which is later determined to be part of a withdrawal described in paragraph (1)(D), the withdrawal liability of the employer shall not be limited to the amount of the prepayment.

(5) In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. For purposes of this section, the term "default" means –

(A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and

(B) any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

(6) Except as provided in paragraph (1)(A)(ii), interest under this subsection shall be charged at rates based on prevailing market rates for comparable obligations, in accordance with regulations prescribed by the corporation.

(7) A multiemployer plan may adopt rules for other terms and conditions for the satisfaction of an employer's withdrawal liability if such rules –

(A) are consistent with this Act, and

(B) are not inconsistent with regulations of the corporation.

(8) In the case of a terminated multiemployer plan, an employer's obligation to make payments under this section ceases at the end of the plan year in which the assets of the plan (exclusive of withdrawal liability claims) are sufficient to meet all obligations of the plan, as determined by the corporation.

(d) Applicability of statutory prohibition. The prohibitions provided in section 406(a) [29 USCS § 1106(a)] do not apply to any action required or permitted under this part.

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§ 1401. Resolution of disputes

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc. (1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 4201 through 4219 [29 USCS §§ 1381-1399] shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of –

(A) the date of notification to the employer under section 4219(b)(2)(B) [29 USCS § 1399(b)(2)(B)], or

(B) 120 days after the date of the employer's request under section 4219(b)(2)(A) [29 USCS § 1399(b)(2)(A)].

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 4219(b)(1) [29 USCS § 1399(b)(1)].

(2) An arbitration proceeding under this section shall be conducted in accordance with fair and equitable procedures to be promulgated by the corporation. The plan sponsor may purchase insurance to cover potential liability of the arbitrator. If the parties have not provided for the costs of the arbitration, including arbitrator's fees, by agreement, the arbitrator shall assess such fees. The arbitrator may also award reasonable attorney's fees.

(3)(A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 4201 through 4219 and section 4225 [29 USCS §§ 1381-1399 and 1405] is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

(B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that –

(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings. (1) If no arbitration proceeding has been initiated pursuant to subsection (a), the amounts demanded by the plan sponsor under section 4219(b)(1) [29 USCS § 1399(b)(1)] shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 4301 [29 USCS § 1451] to enforce, vacate, or modify the arbitrator's award.

(3) Any arbitration proceedings under this section shall, to the extent consistent with this title, be conducted in the same manner, subject to the same limitations, carried out with the same powers (including subpena [sic] power), and enforced in United States courts as an arbitration proceeding carried out under title 9, United States Code [9 USCS §§ 1 et seq.].

(c) Presumption respecting finding of fact by arbitrator. In any proceeding under subsection (b), there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.

(d) Payments by employer prior and subsequent to determination by arbitrator; adjustments; failure of employer to make payments. Payments shall be made by

an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 515 [29 USCS § 1145]).

(e) Furnishing of information by plan sponsor to employer respecting computation of withdrawal liability of employer; fees. If any employer requests in writing that the plan sponsor make available to the employer general information necessary for the employer to compute its withdrawal liability with respect to the plan (other than information which is unique to that employer), the plan sponsor shall furnish the information to the employer without charge. If any employer requests in writing that the plan sponsor make an estimate of such employer's potential withdrawal liability with respect to the plan or to provide information unique to that employer, the plan sponsor may require the employer to pay the reasonable cost of making such estimate or providing such information.

§ 1451. Civil actions

(a) Persons entitled to maintain actions. (1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle [29 USCS §§ 1381 et seq.] with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

(2) Notwithstanding paragraph (1), this section does not authorize an action against the Secretary of the Treasury, the Secretary of Labor, or the corporation.

(b) Failure of employer to make withdrawal liability payment within prescribed time. In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 515 [29 USCS § 1145]).

(c) Jurisdiction of Federal and State courts. The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

(d) Venue and service of process. An action under this section may be brought in the district where the plan is

administered or where a defendant resides or does business, and process may be served in any district where a defendant resides, does business, or may be found.

(e) Costs and expenses. In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

(f) Time limitations. An action under this section may not be brought after the later of –

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

(g) Service of complaint on corporation; intervention by corporation. A copy of the complaint in any action under this section or section 4221 [29 USCS § 1401] shall be served upon the corporation by certified mail. The corporation may intervene in any such action.